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No. 99-1746

In the Supreme Court of the United States

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

versus

HERBERT ANDERSON,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE LOUISIANA SUPREME COURT

PETITION FOR CERTIORARI OF WATERMAN STEAMSHIP CORPORATION

JOHN R. FITZGERALD
McALPINEY PEULER & COZAD
701 S. Peters Street, Suite 300
New Orleans, LA 70130
Phone: (504) 561-0323
Fax: (504) 528-9442
Attorneys for Waterman S.S. Corp.

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

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QUESTION PRESENTED FOR REVIEW

Petitioner Waterman Steamship Corporation submits that its application for a Writ of *Certiorari* to the Louisiana Supreme Court presents the following question for review:

1. DOES THE SUITS IN ADMIRALTY ACT, 46 U.S.C. SECTION 745, PRECLUDE A SEAMAN FROM ASSERTING AGAINST THE OPERATOR OF A VESSEL CHARTERED TO THE UNITED STATES DEPARTMENT OF DEFENSE AND CARRYING EXCLUSIVELY MILITARY CARGO, CLAIMS FOR UNSEAWORTHINESS AND MAINTENANCE AND CURE THAT, IF PROVEN, AUTOMATICALLY GIVE RISE TO A MARITIME LIEN WITH THE ATTENDANT RIGHT TO PROCEED *IN REM* TO ARREST THE VESSEL?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW: i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES INVOLVED IN THIS CASE 4

STATEMENT OF THE CASE 3

ARGUMENT:

I. The Louisiana courts erred in allowing to proceed to trial a case involving an injury aboard a vessel operated exclusively for the United States, carrying only military cargo, in which the plaintiff has raised claims of unseaworthiness and maintenance and cure that, if proven, would automatically give rise to an *in rem* lien with the attendant right to arrest the vessel. 9

A. ANDERSON'S SUIT IS BARRED BY THE SUITS IN ADMIRALTY ACT 9

B. THE RULINGS OF THE LOUISIANA COURTS RENDER NUGATORY KEY PROVISIONS OF THE SIAA 11

TABLE OF CONTENTS Cont'd

Page

C. THE LOUISIANA COURTS' INTERPRETATION OF THE SIAA IS INCONSISTENT WITH PRIOR JURISPRUDENCE 12

D. THE LOUISIANA COURTS ERRED IN EXTENDING *WILLIAMS V. CENTRAL GULF LINES* TO CASES INVOLVING CLAIMS THAT GIVE RISE TO *IN REM* LIABILITY 17

II. The Louisiana courts erred in holding that "factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty" when the United States is not even a party to the suit. 26

A. WHETHER THE UNITED STATES COULD BE HELD LIABLE BY VIRTUE OF THE SIAA IS A LEGAL ISSUE TO BE DECIDED BY THE COURT, NOT A FACTUAL ISSUE TO BE DECIDED BY A JURY 26

TABLE OF CONTENTS Cont'd

Page

III. The Louisiana courts erred in failing to recognize that where unseaworthiness and maintenance and cure claims are asserted against the operator of a vessel carrying military cargo for the United States, the SIAA substitutes an *in personam* claim against the United States, and that remedy is in lieu of any other claim against the operator, even Jones Act negligence claims. . 28

A. A REMEDY UNDER THE SUITS IN ADMIRALTY ACT IS EXCLUSIVE AND IN LIEU OF ANY CLAIM AGAINST THE OPERATOR OF THE VESSEL 28

CONCLUSION 30

APPENDIX:

1. February 18, 2000 Louisiana Supreme court opinion sought to be reviewed

2. December 17, 1999 ruling by the Louisiana Court of Appeals for the Fourth Circuit

3. October 12, 1999 order of the Civil District Court, Parish of Orleans

TABLE OF CONTENTS Cont'd

APPENDIX Cont'd:

4. July 9, 1999 Reply to Opposition to Exception of No Right of Action or No Cause of Action, with alternative Motion for Summary Judgment

5. December 2, 1998 Affidavit of Peter M. Johnston

6. April 30, 1997 Petition for Damages

TABLE OF AUTHORITIES

STATUTES: Page

28 U.S.C. section 1257 ..... 2, 3, 4

28 U.S.C. section 1333 2

46 U.S.C. section 741
..... 4, 6, 8, 9, 11, 16, 19, 20, 21, 23, 25-29

46 U.S.C. section 742 .... 4, 5, 6, 7, 16, 19, 27-29

46 U.S.C. section 745
..... 1-8, 16, 19, 20, 23, 24, 27-29

46 U.S.C. section 688 2

46 U.S.C. section 808 14

JURISPRUDENCE:

Banque-Russo Asiatique-London v. U.S. Shipping Board Emergency Fleet Corp., 266 F. 897 (E.D.Pa.1920) 15

Burkholder v. U.S. (Burkholder I), 56 F.Supp. 106 (E.D.Pa.1944) 21, 22

Burkholder v. U.S. (Burkholder II), 60 F.Supp. 700 (E.D.Pa.1945) 22

Calder v. Jones, 465 U.S. 783 (1984) 4

Calmar S.S. Corp. v. U.S., 345 U.S. 446 (1953) 12, 13

TABLE OF AUTHORITIES Cont'd

Page

Canadian Aviator v. U.S., 324 U.S. 215 (1945) 22, 23

Carter v. American Export Isbrandsten Lines, Inc., 411 F.2d 1185 (2nd Cir. 1969). 10

Churchill v. F/V Fjord, 892 F.2d 763 (9th Cir.1989) *cert. denied*, 497 U.S. 1025 (1990) 18, 19

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 3, 4

Cruz v. Marine Transport Lines, Inc., 634 F.Supp. 107 (D. N.J. 1986), affirmed, 806 F.2d 252 (3rd Cir.1986), *cert denied*, 481 U.S. 1048 (1987) . . 10

Eastern Transportation Co. v. U.S., 913 F.2d 1521 (11th Cir.1990) 23

Epstein v. U.S., 86 F.Supp. 740 (S.D.N.Y. 1949) . 25

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 4

Johnson v. U.S. Shipping Board Emergency Fleet Corp., 280 U.S. 320 (1929) 14

The Lake Monroe, 250 U.S. 246 (1919) 14

Nakano v. U.S. and Vessel Charters, Inc., 1988 AMC 2220 (S.D.Cal.1988) 23, 24

TABLE OF AUTHORITIES Cont'd

Page

Olavarria & Co. v. U.S., 56 F.Supp. 758 (S.D.Ala.1944) 15, 16, 27, 28

The Osceola, 189 U.S. 158 (1903) 18, 19, 20

Peneiro v. U.S. (Peneiro II), 65 F.Supp. 191 (N.D.Cal.1945) 24, 25

Petition of United States, 367 F.2d 505 (3rd Cir.1966), *cert. denied*, 386 U.S. 932 (1967) 10

Plamals v. Pinar Del Rio, 277 U.S. 151 (1928) 18

Schaeffer v. Heitner, 433 U.S. 186 (1977) 4

Third Ntl. Bk. in Nashville v. Impac Ltd., Inc., 432 U.S. 312 (1977) 4

Western Tankers Corp. v. U.S.A., 1975 A.M.C. 775 (S.D.N.Y.1975) 21

Williams v. Central Gulf Lines, 874 F.2d 1058 (5th Cir.1989), *cert. denied*, 493 U.S. 1045 (1990) 1, 8, 17, 18

SUPPLEMENTAL ADMIRALTY RULES:

Supplemental Admiralty Rule C 19

OTHER AUTHORITIES:

The Law of Admiralty, G. Gilmore & C. Black, 2nd Ed. 1975 at p.982 25

DECISIONS BELOW

1. On July 9, 1999 Waterman filed a motion for summary judgment in Louisiana Civil District Court, Parish of Orleans, asserting that it was immune from suit by Herbert Anderson by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act, 46 U.S.C. section 745. Waterman argued that Anderson's "claims should be directed against the United States of America, and should be brought in federal district court."

2. On October 12, 1999 the Civil District Court denied the motion for summary judgment, holding (1) Anderson could pursue Jones Act negligence as well as unseaworthiness, and maintenance and cure claims against Waterman, the operator of the vessel that was chartered to the government and carried exclusively military cargo; and (2) Waterman could not invoke the exclusivity of liability provisions unless it could show that the government "was in charge of the day to day operations of the vessel where plaintiff was injured."

3. On December 17, 1999, the Louisiana Fourth Circuit Court of Appeals denied Waterman's Application for Supervisory Writs, holding (1) *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir.1989), *cert denied*, 493 U.S. 1045 (1990) was dispositive as to Anderson's Jones Act claims; and (2) factual questions remain as to whether the United States, that is not a party to the suit, could be held liable to plaintiff in admiralty.

4. On February 18, 2000 the Louisiana Supreme Court denied Waterman's application for supervisory writs without written reasons.

JURISDICTIONAL STATEMENT

Jurisdiction of the trial court was allegedly predicated upon the Jones Act, 46 U.S.C. section 688, the General Maritime Law, and the savings to suitors clause of 28 U.S.C. section1333. Waterman unsuccessfully argued in state court that the Suits in Admiralty Act requires that Anderson's claims "should be brought in federal district court" and that the proper party defendant is "the United States of America" rather than the private operator of the vessel under charter to the United States. The state courts rejected Waterman's claim that it was immune from suit by virtue of the federal statute, 46 U.S.C. section 745.

Waterman requests that this Court review the February 18, 2000 ruling of the Louisiana Supreme Court that left standing the December 17, 1999 ruling by the Louisiana Court of Appeals for the Fourth Circuit, as well as the October 12, 1999 ruling by the Civil District Court for the Parish of Orleans, denying Waterman's motion for summary judgment.

This Court has jurisdiction to review the rulings below by writ of *certiorari* pursuant to 28 U.S.C. section 1257. The rulings by the Louisiana courts deprive Waterman of its federal statutory immunity from suit, and expose Waterman to trial in Louisiana state court on the Jones Act negligence, unseaworthiness, and maintenance and cure claims asserted by Herbert Anderson.

Although 46 U.S.C. section 745 provides Anderson with a remedy against the United States that is exclusive of any other action against the operator of the vessel, the Louisiana Supreme Court order of February 18, 2000 permits the action against the operator of the vessel to proceed to trial. The only remaining issues pending in state court are whether Waterman is liable for negligence, unseaworthiness, and maintenance and cure, and, if so, the amount of damages to be awarded.

The decision by the Louisiana Supreme Court to force Waterman to defend itself on the merits in state court despite the requirement in 46 U.S.C. section 742 that SIAA suits "shall be brought in the district court of the United States" and the prohibition in section 745 against bringing "any other action by reason of the same subject matter against the agent or employee of the United States... whose act or omission gave rise to the claim" constitutes, within the meaning of 28 U.S.C. section 1257, a "final decree" that resolves the Suits in Admiralty Act exclusive federal jurisdiction and statutory immunity issues. This Court therefore has jurisdiction to issue a writ of *certiorari.*

Reversal of the state court on the federal SIAA issue "would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; failure by this Court to act would "seriously erode federal policy" which statutorily immunizes private companies that operate vessels on behalf of the Military Sealift Command from state court suits, and protects national security by precluding seizure of vessels carrying military cargo. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469,

482-83 (1975); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 177-79 (1988). A holding by this Court giving effect to the plain language of the Suits in Admiralty Act would terminate the state court litigation in its entirety.

Supreme Court review under 28 U.S.C. section 1257 is available even though there has not yet been a full-blown trial on the merits, since the highest court in the State of Louisiana has rejected Waterman's claim of 46 U.S.C. section 745 federal statutory immunity, and has disregarded the requirement of section 742 that SIAA suits be brought only in federal district court. *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984); *Schaeffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977); *Third National Bank in Nashville v. Impac, Ltd., Inc.* 432 U.S. 312 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

STATUTES INVOLVED IN THIS CASE

46 U.S.C. section 741. Exemption of United States vessels and cargoes from arrest or seizure

> "No vessel ... operated by or for the United States... and no cargo owned or possessed by the United States... shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions..."

46 U.S.C. section 742. Libel in personam.

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding *in personam* may be brought against the United States... Such suits shall be brought in the district court of the United States..."

46 U.S.C. section 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims.

> "Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim..."

STATEMENT OF THE CASE

Certiorari should be granted in this case to correct an erroneous interpretation of the Suits in Admiralty Act, 46 U.S.C. section 741 *et. seq.* by the Louisiana state courts. The Louisiana rulings will adversely affect the

public interest by allowing, in contravention of the prohibition contained in 46 U.S.C. section 741, *in rem* seizures of vessels carrying vital military supplies needed by the United States military, and by subjecting private operators that transport military cargo for the United States Department of Defense to suit in Louisiana state courts, in contravention of the exclusivity of liability provisions of 46 U.S.C. section 745 and the exclusive federal jurisdiction provisions of 46 U.S.C. section 742.

The ruling by the Louisiana Supreme Court sets dangerous precedent by permitting to proceed to trial a suit containing allegations of unseaworthiness and maintenance and cure that, if proven, will automatically give rise to *in rem* liens upon a vessel being operated exclusively for the United States government, carrying only military cargo. Under the reading of the Act by the Louisiana courts, a privately owned ship under charter to the United States loaded with a cargo of cruise missiles, ammunition, or military supplies needed to reinforce a contingent of United States troops that may be engaged in hostilities overseas can be arrested and held until civil litigation involving personal injuries is resolved.

This case involves an injury aboard the steamship MAJOR STEPHEN PLESS, a vessel carrying war supplies that is chartered to and operated exclusively for the United States Government, Department of Defense, as a pre-positioned supply ship subject to the orders of the Military Sealift Command (MSC). The issue presented is whether the seaman's exclusive remedy lies against the United States of America pursuant to the Suits in Admiralty Act, 46 U.S.C. section 741 *et seq.*

The MAJOR STEPHEN PLESS is an Afloat

Prepositioning Force ("APF") ship. She is used to carry ammunition and equipment for support of a specially organized Marine Amphibious Brigade (MAB) to enhance rapid deployment of the United States Marine forces. See, Affidavit of Peter M. Johnston at paragraphs 3, 5. The cargo carried by the MAJOR STEPHEN PLESS is exclusively military, non-commercial cargo. *Id.* at paragraph 4.

Pursuant to the terms of the charter party, the United States Government has the right to install on the MAJOR STEPHEN PLESS any defensive armament the Government deems necessary. The Government requires that the master, chief officer, and radio officer must be qualified for a United States Government "Secret" security clearance. All officers must be qualified for a United States Government "Confidential" security clearance. In addition, all of the crew members of the MAJOR STEPHEN PLESS and all officers must be United States citizens. *Id.* at paragraphs 6, 7.

On May 1, 1996, plaintiff Herbert Anderson allegedly tripped on a meat box wrapper on the floor of a refrigeration cooler and sustained injury to his shoulder. His employer, Waterman Steamship Corporation, was operating the MAJOR STEPHEN PLESS on behalf of the Military Sealift Command off the coast of Spain.

Although the Suits in Admiralty Act provides Anderson with an *in personam* remedy against the United States, 46 U.S.C. section 742, and this remedy is exclusive and in lieu of any liability on the part of the operator of the vessel, 46 U.S.C. section 745, Anderson nonetheless filed unseaworthiness, maintenance and cure, and Jones Act negligence claims against Waterman

Steamship Corporation in Civil District Court, Orleans Parish.

Waterman filed a Motion for Summary Judgment, contending that plaintiff's exclusive remedy lies against the United States of America pursuant to the terms of the Suits in Admiralty Act, and that his suit must be brought in federal district court, not state court. The motion was denied by the Honorable Yada Magee, District Court Judge for Civil District Court, Orleans Parish on October 12, 1999. Despite language in 46 U.S.C. section 741 that the Suits in Admiralty Act applies to vessels "operated by or for the United States", Judge Magee ruled that Waterman was not entitled to the benefits of the exclusivity of liability provisions of the Suits in Admiralty Act unless it could show that the government exercised operational control over the day to day operations on board the MAJOR STEPHEN PLESS.

Waterman filed an Application for Supervisory Writs with the Louisiana Fourth Circuit Court of Appeals seeking appellate review of Judge Magee's decision. On December 17, 1999, the Fourth Circuit denied writs, holding that *Williams v. Central Gulf Lines*, 874 F.2d 1048 (5th Cir.1989), *cert. denied*,493 U.S. 1045 (1990) was dispositive as to Anderson's Jones Act claims; and that factual questions remain as to whether the United States, that is not a party to the suit, could be held liable to plaintiff in admiralty.

Waterman then sought Supervisory Writs with the Louisiana Supreme Court. The Louisiana Supreme Court denied the writ application without written reasons on February 18, 2000, thereby allowing the rulings of the lower courts to stand, and subjecting Waterman to trial

on the merits in state court. No trial date has yet been set by the trial court.

ARGUMENT

I. The Louisiana courts erred in allowing to proceed to trial a case involving an injury aboard a vessel operated exclusively for the United States, carrying only military cargo, in which the plaintiff has raised claims of unseaworthiness and maintenance and cure that, if proven, would automatically give rise to an *in rem* lien with the attendant right to arrest the vessel.

A. ANDERSON'S SUIT IS BARRED BY THE SUITS IN ADMIRALTY ACT

As a matter of federal law, Anderson has an exclusive remedy as against the United States of America, and cannot maintain his action against Waterman Steamship Corporation. The Suits in Admiralty Act, 46 USC §§741-745, waives sovereign immunity of the United States not only for suits involving injuries that occur aboard vessels "owned by the United States" but also for suits involving injuries occurring on vessels "operated by or for the United States". 46 USC §741. The damages remedy against the United States pursuant to the Suits in Admiralty Act is "exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim". 46 USC §745 (emphasis added). Accordingly, Herbert Anderson, to the extent that he contends he was injured on board the MAJOR STEPHEN PLESS as a result of negligence and

unseaworthiness, must direct his claims as against the United States. His remedy against the United States is "exclusive of any other action...against the agent", *i.e.*, exclusive of any claim against Waterman.

Many courts have properly applied the rule that where a seaman is injured on board a vessel being operated for the United States, the remedy of the seaman lies exclusively against the United States under the Suits in Admiralty Act. For example, a seaman injured aboard a vessel being operated by American Export Isbrandsten Lines, Inc. for and on behalf of the United States was injured, and he brought suit against the vessel operator. *Carter v. American Export Isbrandsten Lines, Inc.*, 411 F.2d 1185 (2nd Cir. 1969). His suit was dismissed as being barred by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act. 411 F.2d at 1186. Likewise, the remedy of a seaman employed by Marine Transport Lines, Inc. injured aboard a vessel being operated for the United States "lies exclusively against the United States" and "the exclusive liability clause of Section 745...precludes recovery for the same injury against the contract operator whose conduct was the immediate cause of the accident", according to *Cruz v. Marine Transport Lines, Inc.*, 634 F.Supp. 107, 110 (D. N.J. 1986) (emphasis added). Although ordinarily only a seaman's employer is liable under the Jones Act for injuries sustained by the seaman, "The determination of the proper Jones Act defendant in public vessel cases is affected by the exclusive liability provision of Section 745...[S]ection 745 is construed as designating the United States rather than its agent as the entity suable on all claims for harm done by a public vessel as the result of the agent's conduct." *Petition of United States*, 367 F.2d 505, 512 (3rd Cir. 1966). The Louisiana courts in this

case failed to follow this well-established body of caselaw interpreting the federal statute.

B. THE RULINGS OF THE LOUISIANA COURTS RENDER NUGATORY KEY PROVISIONS OF THE SIAA

The Suits in Admiralty Act presently reads as follows, with the key words pertinent to this litigation underlined:

> *"No vessel* owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital sock or in the possession of the United States or of such corporation or *operated by or for the United States shall* after March 9, 1920 in view of the provision herein made for a libel in personam, *be subject to arrest* or seizure by judicial process in the United States or its Possessions..."

46 U.S.C. section 741.

Anderson argued, and the Louisiana courts agreed, that the Act should be interpreted to read "No vessel ... over which the United States exercises operational control ... shall be subject to arrest or seizure...." This is not the language of the statute. The opinion of the Louisiana courts effectively strips the "operated ...for the United States" language from the Act. This Court should correct the state courts' flawed

construction of the federal statute.[1]

Vessels over which the United States exercises operational control are obviously "*operated by*" the United States, and thus already fall within the scope of the Act. The Louisiana interpretation of the Act makes nugatory the additional phrase "*or for the United States.*" Interpretations of a statute that render a phrase nugatory should be avoided.

C. THE LOUISIANA COURTS' INTERPRETATION OF THE SIAA IS INCONSISTENT WITH PRIOR JURISPRUDENCE

The Louisiana court's interpretation of the Act as permitting Anderson to maintain claims that give rise to *in rem* liability on the part of a vessel operated exclusively for the United States military is at odds with prior jurisprudence. This Court, in *Calmar S.S. Corp. v. United States*, 345 U.S. 446 (1953) was faced with the issue of "whether a privately owned steamship, undoubtedly

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[1]The trial court held that it "adopts Plaintiff's argument that the test used by the Courts and more particularly the Federal Fifth Circuit, in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies, is 'operational control'. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further finds that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure." October 7, 1999 Reasons for Judgment at pp. 8-9.

'operated ... for the United States', was 'employed as a merchant vessel' within the meaning of the [Suits in Admiralty] Act while carrying military supplies and equipment for hire." 345 U.S. at 447. Just as Anderson alleged that the Steamship MAJOR STEPHEN PLESS was time chartered and not bareboat chartered[2], so too, the S.S. PORTMAR had been time chartered to the United States. The trial court in *Calmar* had found that "She was owned neither absolutely nor *pro hac vice* by the United States." 345 U.S. at 450. This Court ruled that "[A] vessel operated for, or owned by, the United States cannot now, by virtue of section 1 of the Suits in Admiralty Act, be seized..." *Id.* at 454 (emphasis added). "We hold that the Portmar, a privately owned vessel operated for hire for the United States, was 'employed as a merchant vessel' within the meaning of the Suits in Admiralty Act, although engaged on a war mission." *Id.* at 456.

Under the Louisiana courts' reading of the Act, claims arising on a privately owned vessel operated for hire for the United States engaged on a war mission would not fall within the scope of the Suits in Admiralty Act, so the Louisiana interpretation is at variance with this Court's interpretation of the federal statute.

The interpretation of the Suits in Admiralty Act given by the Louisiana courts frustrates the very purpose of the Act, and, if not corrected by this Court, will take

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[2]The charter party is labeled a time charter, although it has some attributes of a bareboat charter. The Military Sealift Command exercises control over the MAJOR STEPHEN PLESS in a number of ways described in the affidavit of Peter M. Johnston.

us back to the legal status that existed in 1917 when merchant ships carrying supplies for the United States government could be arrested:

> "Prior to passage of the [Suits in Admiralty] Act, merchant vessels of the United States were subject to seizure. Section 9, Shipping Act September 7, 1916, 39 Stat. 730 (46 USCA section 808). *The Lake Monroe*, 250 U.S. 246, 39 S.Ct. 460, 63 L.Ed. 962... The [Suits in Admiralty] Act relieved the United States of the inconvenience resulting from such seizures and gave remedy by libel *in personam* against the United States..."

Johnson v. United States Shipping Board Emergency Fleet Corporation, 280 U.S. 320, 325 (1929).

By allowing Anderson to pursue claims that give rise to *in rem* liability on the part of a vessel being operated for the United States, the Louisiana courts are enabling Anderson to proceed forward to obtain a maritime lien and then arrest the MAJOR STEPHEN PLESS, thereby resulting in great inconvenience to the United States. The rulings below create great uncertainty for the shipping industry that transports government cargo. Under the rationale of the Louisiana courts, vessels chartered to the United States and carrying military hardware could be arrested at any port for a myriad of personal injury, supply, or contract claims unless the private operators could show the government exercised operational control over the day-to-day operations of such vessels, a test that is unlikely to be satisfied where such vessels are privately operated on

behalf of the government. The potential for such vessel arrests will reek havoc on logistics planning and transportation of cargo needed by the United States Military Sealift Command.[3]

As was noted in the first cases interpreting the Suits in Admiralty Act that was adopted by Congress on March 9, 1920, "The apparent intent of sections 1 and 2 of the act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course of transportation, and to substitute for an action *in rem* against the vessel or cargo an action *in personam*." *Banque-Russo Asiatique–London v. United States Shipping Board Emergency Fleet Corporation*, 266 F. 897 (E.D.Pa.1920) (emphasis added).

This interpretation of the Act as substituting an *in personam* claim against the United States for what could otherwise be an actionable *in rem* claim has been applied for many years. For example, at the time of the occurrence giving rise to suit in *Olavarria & Co. v. United States*, 56 F.Supp. 758 (S.D. Ala.1944), the steamship WILLIAM C. ATWATER was owned by the Fall River Navigation Company, chartered to the U.S. Government, and operated for the War Shipping Administration in the merchant service. 56 F.Supp. at 759. Examining the Suits in Admiralty Act, the court held that the purpose of

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[3]The potential for mischief is created by the Louisiana rulings. The holder of a maritime lien on a vessel being operated for the government could, for example, wait until the ship was ready to set sail, or until there was an emergency or national crisis, to arrest the ship, in order to increase settlement bargaining position.

the Suits in Admiralty Act "was to forbid the seizure of the vessel ... operated in the Merchant service, and to give the claimant against either the vessel or the cargo a right to sue the Government *in personam* to recover upon such claim. In other words to substitute the Government for the vessel or the cargo... It is generally conceded that the Suits in Admiralty Act of March 1920 substitutes a remedy *in personam* against the United States for one in rem." 56 F.Supp. at 759. The court also observed that "a cause of action *in personam* against the United States may be maintained ... in those cases where the libelant would have a cause of action *in rem*..." *Id.* at 760. "[I]f the suit could be maintained against a private vessel when the suit was filed, a personal liability can be claimed against the Government." *Id.* at 762 (emphasis added).

The Louisiana courts have failed to heed this principle of federal law that if a suit could be maintained against a private vessel when suit was filed, a personal liability can be claimed against the Government. Herbert Anderson's suit alleges both unseaworthiness and maintenance and cure, claims that could have been maintained against the private vessel, but for the fact that she was being operated for the United States. Since the private vessel MAJOR STEPHEN PLESS was operated for the United States, an *in personam* claim against the United States is substituted for claims that Anderson could otherwise have been maintained *in rem*. 46 U.S.C. sections 741-742. This *in personam* remedy against the United States is exclusive and in lieu of any claim against Waterman, the operator of the vessel. 46 U.S.C. section 745. Suit on such a claim must be brought in federal court, not Louisiana state court. 46 U.S.C. section 742.

D. THE LOUISIANA COURTS ERRED IN EXTENDING *WILLIAMS V. CENTRAL GULF LINES* TO CASES INVOLVING CLAIMS THAT GIVE RISE TO *IN REM* LIABILITY.

The Louisiana courts erred in expanding the holding of *Williams v. Central Gulf Lines*, 874, F.2d 1058 (5th Cir.1989), *cert. denied*,493 U.S. 1045 (1990) to encompass cases involving claims of unseaworthiness, and maintenance and cure, that, if proven, automatically give rise to *in rem* liability.[4]

Williams did not involve claims that exposed a vessel to *in rem* liability, and therefore has no applicability here. *Williams* held (i) there exists a "jurisdictional hook" to sue the United States under the Suits in Admiralty Act where a claim arises on a vessel time chartered to the United States; and (ii) if a claim sounds exclusively in negligence, the United States can be held liable in its capacity as time charterer only if it exercised operational control over the vessel. 879 F.2d at 1061-63. Jones Act negligence and alleged general maritime law negligence were the only claims involved in *Williams*, not unseaworthiness or maintenance and cure.[5] The Fifth

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[4]"We find *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir.1989) to be dispositive in this matter and thus affirm the trial court." December 17, 1999 Order of the Louisiana Fourth Circuit Court of Appeals at p. 1.

[5]The purely negligence based claims in *Williams* involved allegedly negligent medical treatment that had been given by an overseas hospital to a seaman AIDS victim who later died. *Williams*, 874 F.2d at 1079.

Circuit therefore did not have to address whether *in rem* liability of the S.S. BAY would have arisen, and only assessed whether the United States could have faced *in personam* liability in its capacity as a time charterer. Negligence claims such as were asserted in *Williams* do not give rise to maritime liens actionable *in rem*. *Plamals v. Pinar del Rio*, 277 U.S. 151 (1928).

The issue here is not whether the United States would have liability purely in its capacity as charterer of the MAJOR STEPHEN PLESS, but rather, whether the vessel itself could face liability for Anderson's claims. The Fifth Circuit in *Williams* analyzed the government as not having *in personam* liability in its capacity as time charterer since time charterers normally do not have such liability unless they have exercised operational control. The Fifth Circuit did not have occasion to analyze whether the vessel would have faced potential *in rem* liability, however, since no claims were asserted in *Williams* that would have exposed the vessel to liability.

Williams is not dispositive of this case. *Williams* did not disturb the rule that the Suits in Admiralty Act is triggered by the assertion of claims that could expose a vessel being operated for the United States to potential *in rem* liability. The Louisiana courts should not have extended *Williams* to encompass cases involving claims that give rise to *in rem* liability on the part of vessels operated for the United States. Such claims must be directed against the United States.

A vessel is liable *in rem* for unseaworthiness, *The Osceola*, 189 U.S. 158 (1903), no matter who controlled or operated her, so long as the operator was lawfully in possession of the vessel. *Churchill v. F/V Fjord*,

892 F.2d 763 (9th Cir.1989). Accordingly, there are no "factual questions ... as to whether the United States could be held liable to Plaintiffs in admiralty" as the Louisiana Fourth Circuit mistakenly declared. An *in rem* lien arises automatically upon a judgment being entered on an unseaworthiness or a maintenance and cure claim. *The Osceola*, 189 U.S. 158 (1903). The holder of a maritime lien then has the right to proceed *in rem* to arrest a vessel: "An action *in rem* may be brought: (a) To enforce any maritime lien". Supplemental Admiralty Rule C. The only statute barring this outcome is the Suits in Admiralty Act, that prohibits the arrest of vessels such as the MAJOR STEPHEN PLESS, and substitutes in lieu thereof an *in personam* action against the United States. 46 U.S.C. sections 741-742. The allowed *in personam* action against the United States is exclusive of any liability of the ship or of the private operator of the ship. See 46 U.S.C. sections 741, 745.[6]

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[6]The exclusivity of liability provisions of the Suits in Admiralty Act have been triggered by the plaintiff asserting claims that give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS. If plaintiff were to prevail on his unseaworthiness or maintenance and cure claims, he would automatically acquire a maritime lien upon the vessel where his injury occurred, the S.S. MAJOR STEPHEN PLESS. By allowing Anderson's claims to proceed forward, the Louisiana courts have thereby exposed to arrest a vessel that is operated exclusively on behalf of the United States military. The "Louisiana two-step" that has effectively been sanctioned by the Louisiana Supreme Court would, if not corrected by this Court, enable a plaintiff to defeat section 741 by first obtaining a maritime lien by obtaining a judgment in state court on an unseaworthiness claim against the

There are two means by which the government can be held liable under the Suits in Admiralty Act for maritime personal injuries, and once liability is triggered, it is exclusive in lieu of any and all liability of the private operator of the ship. The first means by which the United States can be held liable is if a similarly situated private person time chartering the vessel would have been held liable *in personam* for Jones Act negligence. The Fifth Circuit has indicated that in order to meet this test, it must be demonstrated that the government exercised operational control over the vessel. The second means by which liability on the part of the United States can be triggered is if the vessel that is being operated for the United States, upon which the injury occurred, would be liable *in rem*. For this test, operational control is irrelevant. If a plaintiff is injured in the service of the ship, his right to maintenance and cure attaches as a lien to the very last plank of the ship. Likewise, an award for injuries caused by unseaworthiness of the vessel automatically gives rise to a maritime lien on the ship. See, *The Osceola*, 189 U.S. 158 (1903).

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private operator, then, secondly, proceeding with a federal Rule C action to enforce the maritime lien already created in the Louisiana state court action. The Suits in Admiralty Act was designed to eliminate and foreclose this possibility. In exchange for the right to arrest a vessel for an *in rem* claim or a maritime lien, the Act substitutes an *in personam* remedy against the United States. This *in personam* remedy against the United States is "exclusive of any other action by reason of the same subject matter against the agent or employee of the United States... whose act or omission gave rise to the claim..." 46 U.S.C. section 745.

The Suits in Admiralty Act applies whenever a claim has been asserted that could give rise to *in rem* liability on the part of a vessel that was operated by or for the United States. The government, rather than the private operator is the proper party defendant where a plaintiff has asserted unseaworthiness or maintenance and cure claims that expose a vessel being operated for the United States to potential liability:

> "Since the vessel was being operated by Western Tankers for the United States, as time charterer, and was carrying its oil, Perry could have sued the United States under the Suits in Admiralty Act, 46 U.S.C. section 741 et. seq., for his personal injuries due to the unseaworthiness of the vessel, even though she was manned, equipped and maintained by the owner."

Western Tankers Corp. v. U.S.A., 1975 A.M.C. 775, 780 n. 10 (S.D. N.Y. 1975).

An unseaworthiness claim that gives rise to *in rem* liability on the part of the vessel is transferred by virtue of the Suits in Admiralty Act to an *in personam* claim against the United States:

> "Were this suit based upon the general law of maritime tort, the libelant would have a right *in rem* against the ship if his cause of action was the unseaworthiness of the vessel. *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760. I do not question that, in such case his right of action would be transferred to the United

States by the Suits in Admiralty Act..."

Burkholder v. U.S., 56 F.Supp. 106, 109 (E.D. Penn. 1944) (*Burkholder I*).

Claims for maintenance and cure, that give rise to potential *in rem* liability, trigger the exclusivity of liability provisions of the Suits in Admiralty Act where the injury occurred aboard a vessel being operated for the United States:

> "The second cause of action [being asserted against the United States], for maintenance and cure, is maintainable. This right is a contractual right independent of the seaman's right to recover indemnity under the general maritime law or indemnity under the Jones Act. Since he would have had a right *in rem* against the ship prior to the passage of the Jones Act for maintenance, cure and wages, this cause of action will be transferred by the Suits in Admiralty Act to the United States." (emphasis added)

Burkholder v. U.S., 60 F.Supp. 700, 702 (E.D.Pa. 1945) (*Burkholder II*).

Other cases apparently rejected by the Louisiana courts, holding claims that could give rise to *in rem* liability on the part of a vessel operated for the United States must be brought *in personam* against the United States under the Suits in Admiralty Act include this Court's decisions in *Canadian Aviator v. United States*, 324 U.S. 215, 219 (1945) ("[S]ince the arrest and

seizure of a vessel incident to an admiralty proceeding in rem proved embarrassing, Congress in 1920 adopted the Suits in Admiralty Act."); *Eastern Transportation Co. v. United States*, 272 U.S. 675 (1927); and the Eleventh Circuit's ruling in *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521 (11th Cir.1990).

Another case that supports Waterman's position and demonstrates the Louisiana courts erred is *Nakano v. United States and Vessel Charters, Inc.*, 1988 AMC 2220 (S.D.Cal.1988). *Nakano* was an *"operated for"* case in which the SS SANTA ADELA "was owned by Vessel Charters and time-chartered to the United States and operated for the United States." *Id.* at 2221. Maintenance and cure claims had been asserted against the private operator of the vessel. Claims against the private operator were dismissed pursuant to the Suits in Admiralty Act:

> "A remedy is provided plaintiff for recovery against the United States by the Suits in Admiralty Act, 46 U.S.C. sec. 741, since the vessel is considered to be 'operated by or for the United States.' ... This remedy is exclusive. 46 U.S.C. sec. 745 provides that where a remedy is provided by the Suits in Admiralty Act, it shall be 'exclusive of any other action by reason of the same subject matter against the agent or employee of the United States.' Accordingly, Vessel Charters, Inc.'s motion to dismiss is granted because, as a matter of law, a direct suit by plaintiff against Vessel Charters, Inc. is not available.... Defendant, United States of

> America, in the instant case stands in the place of the shipowner under 46 U.S.C. sec. 745, and thus is responsible for maintenance, which is the obligation of the shipowner."

Nakano, 1988 AMC at 2221 (emphasis added).

Nakano imposed no requirement that the government have exercised operational control over the vessel in order to be liable; the vessel SS SANTA ADELA was operated *for* the United States, not *by* the United States. *Nakano* imposed no requirement that a vessel have been bareboat chartered to the United States in order for the United States to become liable for maintenance and cure claims; the vessel SS SANTA ADELA was time chartered to the United States. Claims that exposed the SS SANTA ADELA to potential *in rem* liability were transferred to the United States, just as Herbert Anderson's claims that expose the MAJOR STEPHEN PLESS to potential *in rem* liability are transferred to the United States. Ronald Nakano's claims against the vessel operator were dismissed by virtue of section 745 of the Suits in Admiralty Act, just as Herbert Anderson's claims against Waterman should be dismissed by virtue of section 745 of the Act.

The Suits in Admiralty Act was held to apply where unseaworthiness claims were asserted arising out of conditions aboard a vessel time chartered to the government in *Peneiro v. United States*, 65 F.Supp. 191, 192 (N.D. Cal. 1945) (*"Peneiro II"*). In that case, the court held that the Suits in Admiralty Act imposes liability *in personam* upon the United States based upon the unseaworthiness of the GLORIA, a vessel time

chartered to the United States:

> "Both the Senate and House Committee reports upon the bill, which later became the Suits in Admiralty Act, clearly indicate that the Congressional purpose was not solely to immunize the United States from seizure of government owned merchant vessels, but as well to eliminate the embarrassment and handicap of *in rem* admiralty proceedings against merchant vessels employed in the service of the United States. See House Report No. 497, page 3 and Senate Report No. 223, pages 1-3, accompanying S.3076, 66th Cong. 2nd Sess."

Peneiro II, 65 F.Supp. at 193.

Another case with which the Louisiana rulings conflict is *Epstein v. U. S.*, 86 F.Supp. 740 (S.D. N.Y. 1949), holding that a privately owned vessel time chartered to the United States was "operated for the United States" within the meaning of the Suits in Admiralty Act, 46 USC §741.

The rulings by the Louisiana courts are also at odds with the analysis of noted admiralty scholars Grant Gilmore and Charles L. Black, who wrote that under the Suits in Admiralty Act, "Recovery *in personam* may be had against the United States where either an *in rem* or an *in personam* liability would have arisen on the same facts as against a private owner." The Law of Admiralty, G. Gilmore & C. Black, 2nd Ed. 1975 at page 982 (emphasis added).

II. The Louisiana courts erred in holding that "factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty" when the United States is not even a party to the suit.

A. WHETHER THE UNITED STATES COULD BE HELD LIABLE BY VIRTUE OF THE SIAA IS A LEGAL ISSUE TO BE DECIDED BY THE COURT, NOT A FACTUAL ISSUE TO BE DECIDED BY A JURY.

The Louisiana Fourth Circuit mistakenly found that "factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty." December 17, 1999 order denying Waterman's application for supervisory writs at p.2. There are no factual questions here; this is purely a legal issue. Indeed, the United States is not even a party to this case, so the jury will never be called upon to decide whether the United States should be held liable.[7]

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[7]Either the supply ship that carries military supplies and is operated exclusively for the Department of Defense can be arrested, or it cannot. If it cannot, as section 741 plainly states, then Anderson's claims that could have been asserted *in rem* are, as a matter of federal statutory law, converted to *in personam* claims against the United States. The *in personam* remedy against the United States is exclusive and in lieu of any remedy against Waterman. This legal issue should be decided at this juncture by the United States Supreme Court. The applicability of the Suits in Admiralty Act is a legal issue is for this Court, not a factual issue for the jury.

A determination that the Suits in Admiralty Act applies can be made from a review of the pleadings attached in the Appendix of this brief. The petition plainly raises unseaworthiness and maintenance and cure claims. The Affidavit of Peter M. Johnston demonstrates that on the date Anderson contends he was hurt, the *MAJOR STEPHEN PLESS* was under charter to the United States and was carrying exclusively military cargo; these facts have never been disputed. The Suits in Admiralty Act therefore applies as a matter of federal law.

Whether a suit could be maintained against a private vessel when the suit was filed is a legal issue ripe for adjudication by the Court now, not a factual one for jury consideration at trial. Anderson's unseaworthiness and maintenance and cure claims could have been directed against the vessel, so, as a matter of law, a personal liability can be claimed against the Government by virtue of the Suits in Admiralty Act.

Although Anderson brought suit in state court against Waterman *in personam* rather than in federal court against the vessel *in rem,* liability is still transferred to the United States under the Suits in Admiralty Act. The question under the SIAA is not whether an *in rem* claim has been brought, but rather, whether a suit could have been maintained *in rem* against a private vessel when the suit was filed. *Olavarria & Co. v. United States,* 56 F.Supp. 758, 762 (S.D.Ala.1944). If *in rem* claims could have been brought against the privately owned vessel being operated for the United States, then *in rem* seizures are forbidden under section 741, the United States is substituted as the proper party defendant under section 742, and the operator is shielded from liability pursuant to section 745. "[I]f the suit could be

maintained against a private vessel when the suit was filed, a personal liability can be claimed against the Government." *Olavarria & Co.*, 56 F.Supp. at 762 (emphasis added).

Anderson's claims could have been brought against the MAJOR STEPHEN PLESS, a privately owned vessel operated for the United States, so he is forbidden by section 741 from either suing the vessel initially or foreclosing upon a maritime lien; liability for his claims is transferred to the United States by section 742; and Waterman, the private operator, is shielded from liability by section 745.

The private operator of the MAJOR STEPHEN PLESS is immune from suit as a matter of federal statutory law. There is no need for a trial. This Court should exercise its authority to correct the erroneous construction of a federal statute by the Louisiana courts.

III. The Louisiana courts erred in failing to recognize that where unseaworthiness and maintenance and cure claims are asserted against the operator of a vessel carrying military cargo for the United States, the SIAA substitutes an *in personam* claim against the United States, and that remedy is in lieu of any other claim against the operator, even Jones Act negligence claims.

A. A REMEDY UNDER THE SUITS IN ADMIRALTY ACT IS EXCLUSIVE AND IN LIEU OF ANY CLAIM AGAINST THE OPERATOR OF THE VESSEL

Another flaw in the Louisiana Fourth Circuit Court

of Appeal's analysis of federal statutory law, which the Louisiana Supreme Court allowed to stand, is its theory that the exclusivity shield of section 745 could apply to one of Anderson's claims, but not another. Either the federal statute applies in this case or it does not; there is no middle ground. Once a remedy is provided by the Suits in Admiralty Act, the exclusivity of liability provisions of section 745 are triggered, and the government's liability is exclusive and in lieu of any other claim against the operator of the vessel arising out of Anderson's personal injury on board the MAJOR STEPHEN PLESS: "*Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States ... whose act or omission gave rise to the claim". 46 U.S.C. section 745 (emphasis added).

Anderson's assertion of unseaworthiness and maintenance and cure claims trigger potential *in rem* liability on the part of the MAJOR STEPHEN PLESS, so an *in personam* remedy against the United States is substituted. 46 U.S.C. sections 741-742. This remedy is in lieu of any other claim against the operator, Waterman Steamship Corporation, arising out of the accident of Herbert Anderson on board the MAJOR STEPHEN PLESS, including any Jones Act negligence claims. 46 U.S.C. section 745. The Louisiana Fourth Circuit's opinion that "[W]e deny the writ in regards to Plaintiff's claim under the Jones Act" mistakenly implies that even though Anderson has asserted unseaworthiness claims that trigger *in rem* liability, the Jones Act claims could somehow proceed against the operator. This is not the case. Once the Act applies, and a remedy is provided against the United States, the operator is then

statutorily shielded from any liability by virtue of the exclusivity of liability provisions of section 745.

CONCLUSION

The holdings of the Louisiana courts expose private operators of vessels carrying military cargo to suit in state court, in contravention of the exclusive federal jurisdiction provisions of SIAA section 742, and to liability in contravention of the exclusivity of liability provisions of SIAA section 745. The holdings also leave the United States vulnerable to having its privately operated ships arrested for personal injury claims, in contravention of SIAA section 741, even if the ships carry ammunition vital to United States military operations underway overseas.

WHEREFORE, Waterman Steamship Corporation respectfully prays that the United States Supreme Court GRANT its petition for *certiorari*, REVERSE the ruling of the Louisiana Supreme Court, and order that claims against Waterman, the private operator of the vessel chartered to the government, be DISMISSED.

Respectfully submitted this 19th day of April, 2000.

JOHN R. FITZGERALD
McALPINE, PEULER & COZAD
701 S. Peters Street, Suite 300
New Orleans, LA 70130
Phone: (504) 561-0323
Fax: (504) 528-9442
Attorneys for Waterman S.S. Corp.

Supreme Court, U.S.
FILED

No. 991746 MAY 1 - 2000

OFFICE OF THE CLERK

In the Supreme Court of the United States

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

versus

HERBERT ANDERSON,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE LOUISIANA SUPREME COURT

APPENDIX TO PETITION FOR CERTIORARI OF WATERMAN STEAMSHIP CORPORATION

JOHN R. FITZGERALD
McALPINEY PEULER & COZAD
701 S. Peters Street, Suite 300
New Orleans, LA 70130
Phone: (504) 561-0323
Fax: (504) 528-9442
Attorneys for Waterman S.S. Corp.

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

APPENDIX

1. February 18, 2000 Louisiana Supreme court opinion sought to be reviewed

2. December 17, 1999 ruling by the Louisiana Court of Appeals for the Fourth Circuit

3. October 12, 1999 order of the Civil District Court, Parish of Orleans

4. July 9, 1999 Reply to Opposition to Exception of No Right of Action or No Cause of Action, with alternative Motion for Summary Judgment

5. December 2, 1998 Affidavit of Peter M. Johnston

6. April 30, 1997 Petition for Damages

APPENDIX 1

The Supreme Court of the State of Louisiana

HERBERT ANDERSON

VS. NO. 1999-CC-3613

WATERMAN STEAMSHIP CORPORATION

- - - - - -

IN RE: Waterman Steamship Corporation; - Defendant; Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. F, Nos. 97-7697; to the Court of Appeal, Fourth Circuit, No. 99-C-2866

- - - - - -

February 18, 2000

Denied.

HTL
PFC
WFM
CDK
BJJ
JPV
JTK

TRAYLOR, J., not on panel.

Supreme Court of Louisiana
February 18, 2000

/S/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX 2

NO. 99-C-2866
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

HERBERT ANDERSON

versus

WATERMAN STEAMSHIP CORPORATION

In Re: WATERMAN STEAMSHIP CORPORATION
Applying for: SUPERVISORY WRIT
Directed to: HONORABLE YADA MAGEE, JUDGE CIVIL DISTRICT COURT, PARISH OF ORLEANS DIVISION "F", 97-07697

WRIT DENIED

We find *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989) to be dispositive in this matter and thus affirm the trial court. *Williams* states that a Jones Act negligence claim may be brought against a privately owned and operated vessel that is time-chartered to the United States. Therefore, we deny the writ in regards to Plaintiff's claim under the Jones Act.

These facts differ from *Williams* in that Plaintiff also asserts maintenance and cure and unseaworthiness claims, which give rise to *in rem* liability.[1]

A cursory reading of 46 U.S.C. 741 seems to imply

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[1] *The Osceola*, 189 U.S. 158 (1903).

that claims of maintenance and cure and unseaworthiness may not be brought against the Major Stephen Pless because it is "operated by or for the United States" and such ships cannot be "subject to arrest or seizure by judicial process." Nevertheless, the rationale of Section 741[2] is that the United States is made liable in personam via Section 742.

In this case factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty. For these reasons we deny the writ as concerns Plaintiffs claims of maintenance and cure and unseaworthiness.

New Orleans, Louisiana this 17th day of December, 1999.

s/s MEK

JUDGE MICHAEL E. KIRBY

s/s RJK

CHIEF JUDGE ROBERT J. PLESS

s/sRAB

JUDGE ROBERT A. KATZ

DEC 1 7 1999

[2] The exact language is: "in view of the provision herein made for a libel in personam." This language refers to Section 742.

APPENDIX 3

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION:"F"' (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

On September 3, 1999, a hearing was held on Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action and Defendant Waterman Steamship Corporation's Motion for Summary Judgment.

After considering the Motions, Memorandums and Exhibits filed by Defendant Waterman Steamship Corporation; *Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Exception of No Right of Action or No Cause of Action; Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Motion for Summary Judgment; Plaintiff Herbert Anderson's Statement of Contested Material Facts;*

the Exhibits attached to Plaintiff's Memorandums, which were marked, filed, and introduced into evidence, and the argument of counsel, the Court issues the following Reasons for Judgment:

On May 1, 1996, Plaintiff, Herbert Anderson, (hereinafter referred to as "Plaintiff"), was employed by Waterman Steamship Corporation, (hereinafter referred to as "Defendant"), as a Seaman and Assistant Cook Utility of the crew. Plaintiff was permanently assigned to a vessel in navigation which Plaintiff contends was being operated by his employer Defendant Waterman Steamship Corporation. The vessel was named the S.S. MAJOR STEPHEN W. PLESS.

On May 1st, 1996, Plaintiff was engaged in the course and scope of his employment aboard the S.S. MAJOR STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

Plaintiff alleges that on that date, an employee or employees of Waterman Steamship Corporation who was working on the boat on or about May 1, 1996, carelessly left an object or objects on the floor of the meat box of the galley, on the S.S. MAJOR STEPHEN W. PLESS, which caused Plaintiff Herbert Anderson to trip, slip, or otherwise fall over the object or objects on the floor and into a rack or shelf in the galley. Plaintiff alleges that he sustained injuries as a result of this accident. Plaintiff further alleges that he does not know the name of the person or persons who left the object or objects on the floor, but believes they were employees of Waterman.

In Plaintiff's *Petition for Damages* filed in this matter he has alleged that he has a right of action against

Waterman, his employer, under both the general maritime law as well as in his capacity as a seaman. Plaintiff is making not only a Jones Act negligence claim, but also claims for unseaworthiness and maintenance and cure.

1. PLAINTIFF'S RIGHT OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

Defendant alleged in its Exception that "....by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act, 46 USC §§ 741-745, Herbert Anderson has no cause of action and/or no right of action against Waterman Steamship Corporation. " (Defendant's Exception of No Right of Action or No Cause of Action, p.1). Defendant in its Memorandum in support of the exceptions contended that Plaintiff "....has no cause of action and no right of action against Waterman Steamship Corporation, since his exclusive remedy is against the United States." (Defendant's Memorandum in Support of Exception of No Right of Action or No Cause of Action, p. 1).

However, for the reasons to be discussed in the next section, the Court determines that Plaintiff does have a cause of action and a right of action against his employer Waterman Steamship Corporation for the injuries he alleges he suffered while working aboard the S.S. MAJOR STEPHEN W. PLESS.

The Louisiana Fourth Circuit Court of Appeal recently discussed the exception of no cause of action in *Dragon v. Cooper/T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006. In *Dragon, supra*, the Fourth Circuit stated that:

The purpose of an exception of no cause of action is to determine the sufficiency in the law of the petition. The exception is triable on the face of the papers and for the purposes of determining the issues raised b the exception, the well pleaded facts in the petition must be regarded as true. *City of New Orleans v. Board of Com'rs,* 93-0690 (La. 7/5/94), 640 So.2d 237, 241. The standard for granting an exception of no cause of action is as follows:

The burden of demonstrating that no cause of action has been stated is upon the mover or exceptor. in deciding the exception of no cause of action, the court must presume all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party. In reviewing a trial court's ruling sustaining an exception of no cause of action, the court of appeal and the (supreme) court should subject the case to de novo review because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition.

In appraising the sufficiency of the petition we follow the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. The question therefore is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. The petition should not be dismissed merely because plaintiff's allegations do not support the legal theory he

intends to proceed on, since the court is under a duty to examine the petition to determine if the allegations provide for relief on any possible theory.

640 So.2d at 253 (citations omitted).

Id. at 98-1375, at pp. 2-3; 726 So.2d at 1007-1008.

In *Jefferson Downs Corp., Inc. v. Louisiana State Racing Commission*, 98-1229, 98-1230, 98-1231, (La. App. 4th Cir. 1/13/99), 727 So.2d 644, the Louisiana Fourth Circuit discussed the exceptions of no cause of action and no right of action. In *Jefferson Downs, supra*, the Court held that:

Exception of no cause of action

Although the procedural history and issues are complicated in this case, the fact remains that the only effect of Commission's rulings are to issue documents allowing Evangeline Downs to cause a referendum election in St. Landry Parish. However, review of the pleadings, in light of the applicable Louisiana state law, reveals that the trial court correctly dismissed the petition for judicial review on the exception of no cause of action.

The applicable law on this issue has recently been summarized by the Louisiana Supreme Court in *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission*, 94-2015 (La. 11/30/94), 646 So.2d 885, a case cited by Livingston Downs, as follows:

> An action can only be brought by a person having a real and actual interest which he asserts. La. Code Civ. Proc. Art. 681. The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. Art. 927 (5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Bernie-Bailey Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation....

Id. at 98-1229, 98-1230, 98-1231, p. 6; 727 So.2d at 646-647. (Citation omitted).

The Court finds that from the allegations in Plaintiffs *Petition* filed into the record in this matter, as well as the applicable law on this issue, that Herbert Anderson has a real and actual interest in this action. He fits within the class of persons to whom the law grants the causes of action asserted in his *Petition for Damages*. Thus, Defendant Waterman Steamship Corporation's Exception of No Right of Action is overruled.

11. PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

The initial inquiry is what law governs in a maritime personal injury case such as the one at bar. The Louisiana Supreme Court in *Prejean v. Industrial Cleanup, Inc., et al,* 98-0948 (La 12/l/98), 721 So.2d 1273, stated that: "....State courts must apply the same law to a maritime claim that a federal court would apply had the case been filed in federal court. 1 *Benedict on Admiralty* (MB) § 112 (7th ed. 1998)". *Id.* at 98-0948 at p. 9; 721 So.2d at 1278.

In *Dragon v. Cooper T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006, cited earlier in these Reasons for Judgment, the Louisiana Fourth Circuit Court of Appeal stated that:

> State courts exercising maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So.2d 89, 94....

Id. at 98-1375 at p. 7; 726 So.2d at 1009.

In *Holmes v. Daybrook Fisheries, Inc.*, 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, writ application *pending*, 99-C-1571 (filed June 1, 1999), the Fourth Circuit stated that:

> Admiralty claims may be brought in federal court pursuant to its admiralty jurisdiction or in state

> court under the savings to suitors clause; in either case, federal substantive maritime law applies....

Id. at 98-1824 at pp. 2-3; 730 So.2d at 1008, (Citation omitted).

The United States Fifth Circuit Court of Appeal discussed the very issue raised by Defendant in their no cause of action exception, in *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989), *cert denied*, 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990). [1] In *Williams, supra,* Ballard Williams, a seaman who was employed by Central Gulf Lines, aboard its vessel the S/S Bay became ill while on board, and after being transferred to a hospital, subsequently died. The representative of his estate, Williams, filed suit against Central Gulf pursuant to the general maritime law and the Jones Act, 46 U.S.C. § 688, alleging various acts of negligence. *Id.* at 1059.

The Fifth Circuit described the procedural events leading up to the appeal as follows:

> During discovery it was revealed that, at the time of Ballard's death, the S/S Bay was under a time charter to the United States for use by the Military Sealift Command, an agency of the Department of the Navy. Central Gulf moved for

1 The Louisiana Supreme Court in *Vendetto vs. Sonat Offshore Drilling Co.*, 97-3103 (La. 1/20/99); 725 So.2d 474, *rehearing denied*, __ So.2d __, 97-3103 (La. 2/12/99), *U.S. cert den.* __ U.S. __, 119 S.Ct. 2369, 2370 (1999), discussed by Plaintiff in his memorandum, when discussing a recent maritime federal Fifth Circuit case, noted that they were "not bound by the Fifth Circuit's decision...." *Id.* at 97-3103, at p. 9; 725 So.2d at 478-479. Thus, while technically this state court may not be bound by federal Fifth Circuit law, the Court finds that the Fifth Circuit's reasoning is persuasive authority for this Louisiana state court, and thus adopts it.

summary judgment or, alternatively, to dismiss on the grounds that, pursuant to the Suits in Admiralty Act's exclusivity provision, the plaintiff's sole remedy was a claim against the United States. The district court agreed with Central Gulf's interpretation of the Suits in Admiralty Act and because the United States had not been named as a party-defendant, dismissed the suit. The appellant since filed a timely notice of appeal.

Id. at 1059.

The Suits in Admiralty Act as discussed by the Court in *Williams, supra*, in pertinent part provides as follows:

§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim:

46 U.S.C.A. § 745 (West 1975).

In *Williams, supra*, the Defendant Central Gulf argued on appeal that since the Public Vessels Act or alternatively, the Suits in Admiralty Act provided a remedy for Plaintiff against the United States, that Section 745, thus operated as a bar to Plaintiff's claim against Central Gulf. *Id.* 874 F.2d at 1060. The Fifth Circuit however after carefully examining legislative history, as well as the relevant case law, concluded that neither the Suits in Admiralty Act nor the Public Vessels Act provided a remedy to Plaintiff against the United States under the facts present in *Williams*, and thus, "that the exclusivity provision, therefore, does not bar suit against Central Gulf." *Id.*

The Court in *Williams*, next extensively discussed the Suits in Admiralty Act. In *Williams, supra*, the Court discussed this issue as follows:

IV. THE SUITS IN ADMIRALTY ACT

> The exclusivity provision may bar the appellant's suit against Central Gulf where a remedy (against the United States) is provided by (the Suits in Admiralty Act.)" 46 U.S.C. App. § 745. As mentioned above, this court recognized that the provisions of the Suits in Admiralty Act do not themselves *provide* a remedy. Rather, the Act merely acts to waive the United States immunity so as to furnish a "jurisdictional hook on which to hang a traditional admiralty claim." *Trautman*, 693 F.2d at 444. In light of Trautman, we view the issue of whether a remedy against the United States *is provided* by the Suits in Admiralty Act as entailing a two part inquiry. First, we must ask whether the United States has consented to suit given the facts at hand. This is the "jurisdictional hook" inquiry and involves applying the

Act's statutory language to the present circumstances. If a jurisdictional hook is found to exist, we must then ask whether the party attempting to invoke the exclusivity provision as a defense to suit has shown that "a traditional admiralty claim" could have been stated against the United States. Only by satisfying this two part test can it be concluded that "a remedy is provided by (the Suits in Admiralty Act)" so as to justify barring plaintiffs from bringing suit against private entities such as Central Gulf.

A. The "Jurisdictional Hook" Inquiry

As discussed, Central Gulf owned the S/S Bay, the vessel on which Ballard became ill. Pursuant to a written agreement, Central Gulf time chartered the vessel to the United States but retained possession and control of the vessel's day-to-day operations. *See supra* Articles 31 and 22(a) of the charter agreement. The United States controlled the cargoes carried and ports of call and destination to which the vessel sailed.

Based on these relationships, Central Gulf argues that the Suits in Admiralty Act functions to waive the United States' sovereign immunity thus establishing a jurisdictional hook. We agree....

****

In view of the 1960 amendment, if a proceeding in admiralty could be asserted against a private person in the Government's position, then the Suits in Admiralty Act will provide a jurisdictional hook on which to hang a claim against the Government. Had a private person time chartered the S/S Bay, we are persuaded that, based on notions of operational con-

trol, such persons could be subject to suit for the negligence alleged herein. Thus, by operation of the 1960 amendment to the Suits in Admiralty Act, the Government, under the present circumstances, has consented to suit as if a private person were involved.

B. The "Traditional Admiralty Claim" inquiry

The Suits in Admiralty Act will not "provide a remedy" as envisioned by section 745's exclusivity provision unless, when the action arose, principles of maritime law would have allowed the appellant to state a claim against a private person in the same position as the Government, i.e. against a private time charterer. This Circuit's general rule is that a time charterer " 'who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.' " *P&E Boat Rentals, Inc. v. Ennia General Insurance Co., Inc.*, 872 F.2d 642, 647 (5th Cir. 1989)(quoting *Mallard v. Aluminum Co. of Canada, Inc.*, 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981)). *See also M.J. Norris, The Law of Maritime Personal Injuries 3d*, § 130 (1987). The term "control" as used by this court in formulating this general rule refers to operational control of the vessel, not ultimate control of its destination or cargos.

Article 22(a) of the present charter agreement patently states that '[t]he Master of the Vessel...shall not be under the direction of the Charterer as regards navigation, care and custody of the Vessel and care of the cargo." We find that, by operation of this pro-

vision, the United States acquired no operational control over the vessel. Although the charter provides that the United States shall bear certain costs, responsibility for costs "in and of itself does not transfer operational responsibility from the owner." *Mallard*, 634 F.2d at 242 n. 5. Indeed, "this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect." *Id.* The charter contains no clear language whereby the United States assumes responsibility for the vessel's operations or for the personal injuries caused by the negligence of the crew. We therefore hold that operational control did not shift from Central Gulf to the United States and that, given the specific facts at hand, the appellant would have been unable to state a claim against the United States as time charterer.

V. CONCLUSION

Application of our two part inquiry indicates that the second prong, i.e. the existence of a traditional admiralty claim prong, has not been met. Because a jurisdictional hook alone does not suffice to "provide a remedy" under the Suits in Admiralty Act, section 745's exclusivity provision does not operate to bar suit against Central Gulf. We therefore, VACATE the dismissal of the appellant's claims and REMAND for proceedings not inconsistent with this opinion.

Id. at 1061-1063. (Emphasis added).

The Court finds the reasoning in *Williams, supra*, to be persuasive and adopts the "operational control" test in determining whether or not the exclusivity provisions of the

Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further adopts Plaintiff's argument that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. *See Also: Favorite v. Marine Personal and Provisioning, Inc.*, 955 F.2d 382, 384-385, 388 (5th Cir. 1992); *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 441-444 (5th Cir. 1982); *Servis v. Hiller Systems Inc.*, 54 F.3d 203, 208 (4th Cir. 1995), *cert. den.*, 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996). *Morales-Melendez v. Steamship Mut.*, 763 F. Supp. 1174, 1175-1176, 1179-1180 (D. Puerto Rico 1991); *Nakano v. United States of America and Vessel Charters, Inc.*, 1988 AMC 2220, (U.S.D.C. So. Dist. Cal. 1988); *Nelson v. Research Corp. Of University of Hawaii*, 805 F. Supp. 837, 846-848 (D. Hawaii 1992).

The Court further finds that several of the cases cited by Defendant Waterman: Pineiro v. United States, 65 F. Supp. 191 (Dist. Ct., N. D. Cal, S. D. 1945); *Burkholder v. United States,* 60 F. Supp. 700 (Dist Ct., E.D. Penn. 1945) (On Reargument); *Epstein v. United States*, 86 F. Supp. 740 (U.S.D.C., S.D.N.Y. 1949); and *Western Tankers Corporation v. United States*, 1975 AMC 775 (U.S.D.C., S.D, N.Y. 1975), appear to use an "operated by or for" test to determine whether or not the exclusivity provisions of the Suits in Admiralty Act applies.

The Court however, as stated earlier, agrees with Plaintiff that the more modern 64 operational control" test should be used in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is

who was in charge of the day to day operations of the vessel where the plaintiff was injured.

The Court further finds that based on Plaintiff's exhibits, that in the case at bar, the United States is a time charterer pursuant to a Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985.

The Court finds that in considering the arguments of Plaintiff, he has demonstrated through his pleadings, his memorandums and the exhibits attached thereto, as well as his Petition for Damages, Statement of Contested Material Facts, and all other pleadings and exhibits on.file in the record of this matter, that he has set forth specific facts showing that Plaintiff has sued the right party and that his action against his employer Waterman Steamship Corporation is not barred by the exclusivity of liability provisions of the Suits in Admiralty Act, and thus, Defendant's Exception of No Cause of Action is overruled.

III. SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS MATTER.

As stated earlier, the Court adopts Plaintiff's argument that the test used by the Courts and more particularly the Federal Fifth Circuit, in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies, is "operational control". That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further finds that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admi-

ralty claims, such as unseaworthiness and claims for maintenance and cure.

For the purposes of Defendant's motion for summary judgment, it is significant that the federal Fifth Circuit in *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982), indicated that the question of whether or not the Government exercised sufficient operational control of the vessel, to be held liable for an injured Plaintiff's injuries, is a question of fact.

In *Trautman, supra,* the Fifth Circuit explained this as follows:

> We must now turn to appellant's substantive arguments relating to whether Steber was an agent of the United States and/or whether the United States was in sufficient operational control of Steber's activities in order to cause the United States to be liable under the Jones Act, 46 U.S.C.§ 688, for the negligence of Steber which caused or contributed to appellant's injuries. Appellant contends that the combination of Boyd's visits to the barge, the contract change for the work on the Mecca, and the designation of the civilian members of the operation as part of the "Force" in the Egyptian/United States agreement is sufficient to demonstrate that Steber was an agent of the United States and/or under its operational control. Although appellant couches this argument in terms of an improper determination of the legal standards to be applied, we believe that the question is really one of fact to which our review is limited to the clearly erroneous standard as announced in *McAllister, supra.*

Id. at 445, (emphasis added).[2]

The Louisiana Fourth Circuit Court of Appeal recently discussed the standard for evaluating summary judgments in *Davis v. Bd. Of Supervisors of La. State University et al*, 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied*, 98-C-1329 (La. 6/26/98), 719 So.2d 1288. In *Davis supra*, the Fourth Circuit held that:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion requires him only to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C(2).

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2 Buck Steber, Inc., (Steber), hired Appellant Trautman as one of the divers to carry out its part of a subcontract involving diving services necessary for the removal of sunken vessells in the Suez Canal. *Id.* at 442.

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; *Townley v. City of Iowa,* 97-493 (La. App. 3 Cir. 10/29/97); 702 So.2d 323, 326.

The amended article 966 substantially changes the law of summary judgment. Under the prior jurisprudence, summary judgment was not favored and was to be used only cautiously and sparingly. The pleadings and supporting documents of the mover were to be strictly scrutinized by the court, while the documents submitted by the party in opposition were to be treated indulgently. Any doubt was to be resolved against granting summary judgment, and in favor of trial on the merits. *Sassone v. Elder,* 626 So.2d 345 (La. 1993). The jurisprudential presumption against granting the summary judgment was legislatively overruled by La. C.C.P. art. 966 as amended. The supporting documentation submitted by the parties is to scrutinized equally and the overriding presumption in favor of trial has been deleted. Once the motion for summary judgment has been properly supported by the mover, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. The amendment to La. C.C.P. art. 966 brings Louisiana's standard for summary judgment closely in line with the federal standard under Fed. Rule Civ. Proc. 56(c)....

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In construing the federal summary judgment

> rule, the United States Supreme Court held that summary judgment shall be granted where the evidence is such that it would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986). If a defendant in an ordinary civil case moves for summary judgment or a directed verdict based on the lack of proof of a material fact, the judge must ask himself whether a fair-minded jury could return a verdict for the non-moving party on the evidence presented. *Id.* The *Anderson* court further held that the mere existence of a scintilla of evidence on the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for that party....
>
> *Id.* at 97-0382 at pp. 7-9; 709 So.2d at 1033-34. (String citations omitted).

The Louisiana Fifth Circuit Court of Appeal recently discussed what constitutes a "material fact". In *Azreme, Corp. v. Esquire Title Corp.*, 98-1179 (La. App. 5th Cir. 3/30/99), 731 So.2d 422, the Fifth Circuit stated that:

> .... The amended version of LSA-C.C.P. art. 966 now proclaims that the summary judgment procedure is favored and shall be construed to accomplish the ends of just, speedy, and inexpensive determination of allowable actions. *Tonubbee v. River Parishes Guide,* 97-440 (La. App. 5th Cir. 10/28/97), 702 So, 2d 971. The plaintiff filed the summary judgment motion in this case. Under the amended version of LSA-C.C.P. art. 966, the burden of proof remains on the mover to show "that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." *Id.* at 974. A material

> fact is one that would matter on the trial of the merits. *J.W. Rombach, Inc. v. Parish of Jefferson*, 95-829 (La. App. 5th Cir. 2/14/96), 670 So.2d 1305. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. *Id.* at 1308.
>
> ****
>
> ....If the supporting documents produced by the mover are sufficient to resolve all material fact issues, then the burden of proof shifts to the opposing party to present evidence that material facts are still in dispute. *Herman v. Rome*, 95-666 (La. .App. 5th Cir, 1/17/96), 668 So.2d 1202. If the supporting documents are not sufficient to resolve all material fact issues, summary judgment must be denied. *Id.*

Id, at 98-1179, at pp. 5-6; 731 So.2d at 425, (emphasis added).

The Court adopts Plaintiff's argument that there are disputed issues of material fact and law as to the following, such that summary judgment is inappropriate in this matter:

1. There are disputed issues of material fact as to who had operational control of the S.S. MAJOR STEPHEN W. PLESS, such that summary judgment is inappropriate.

2. There are disputed issues of material fact as to whether or not the overall operational control of the S.S. MAJOR STEPHEN W. PLESS, remained at all times the responsibility of Defendant Waterman Steamship Corporation, such that summary judgment is inappropriate.

3. There are disputed issues of material fact as to whether or

not the intent of the parties is to place Defendant Waterman with responsibility for its employees and for any personal injuries which Waterman employees sustain while carrying out their duties, such that summary judgment is inappropriate.

4. There are disputed issues of material fact and law as to whether or not the United States has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Plaintiff Herbert Anderson such that summary judgment is inappropriate.

5. There are disputed issues of material fact and law as to whether or not the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Plaintiff Herbert Anderson, such that summary judgment is inappropriate.

6. There are disputed issues of material fact and law as to whether or not the fact that the Government may have directed the destination of the vessel or the ultimate destination of the cargo of the S.S. MAJOR STEPHEN W. PLESS, constitutes the kind of operational control necessary to overcome the clear terms of the operating contract, and shift liability for Plaintiff's personal injuries from his employer Waterman to the United States. Thus, summary judgment is inappropriate.

CONCLUSION

For the reasons discussed in these Reasons for Judgment, the Court makes the following rulings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action are overruled;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Motion for Summary Judgment is denied,

REASONS FOR JUDGMENT READ, AND SIGNED IN CHAMBERS THIS 7 DAY OF Oct. 1999, AT NEW ORLEANS, LOUISIANA.

/s/ illegible
JUDGE

A True Copy
s/s ilegible
Deputy Clerk

APPENDIX 4

46603/JRF/lmr 0032-5573

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO.: 97-07697 DIVISION "F"

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

REPLY TO OPPOSITION TO WATERMAN STEAMSHIP CORPORATION'S EXCEPTION OF NO RIGHT OF ACTION OR NO CAUSE OF ACTION, AND ALTERNATIVE PRAYER FOR RELIEF UNDER LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 966

NOW INTO COURT, through undersigned counsel, comes Waterman Steamship Corporation, and hereby replies to Herbert Anderson's opposition to Waterman's Exception of No Right of Action or No Cause of Action, and prays for

alternative relief under Louisiana Code of Civil Procedure article 966.[1]

THE SUITS IN ADMIRALTY ACT SUBSTITUTES AN *IN PERSONAM* REMEDY AGAINST THE UNITED STATES FOR CLAIMS THAT COULD GIVE RISE TO *IN REM* LIABILITY OF VESSELS BEING OPERATED FOR OR ON BEHALF OF THE UNITED STATES

Herbert Anderson devotes virtually his entire brief to an analysis of whether the government could be subjected to liability as a purported time-charterer for what plaintiff contends to have been Jones Act negligence that led to his injury. Plaintiff has failed, however, to analyze the second basis by which the Suits in Admiralty Act can be triggered, namely, by his assertion of claims that can give rise to *in rem liability* on the part of the S/S MAJ. STEPHEN W. PLESS, a vessel operated for or on behalf of the United States of America. Plaintiff's Suits in Admiralty Act analysis is therefore shallow and incomplete. Once application of the Suits

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[1] Plaintiff has objected to documentary evidence having been attached to the Exception of No Cause of Action. Accordingly, Waterman Steamship Corporation prays for and is entitled to relief under Louisiana Code of Civil article 966 as an alternative basis for dismissal of the plaintiff's petition for damages. Summary judgment is appropriate in this case for the same reasons as set forth in the Memorandum in Support of the Exception of No Right of Action or No Cause of Action, and as set forth in this reply memorandum. There are no genuine issues as to any material facts, and Waterman is entitled to judgment as a matter of law because liability for plaintiff's accident rests exclusively with the United States Government pursuant to the Suits in Admiralty Act. Waterman hereby formally amends its Exception of no Right of Action or No Cause of Action by moving for alternative relief of summary judgment.

in Admiralty Act is triggered, liability of the United States is exclusive and in place of all other liability, including that of the operator of the vessel. 46 USC §745.

Plaintiff has asserted claims not only for alleged Jones Act negligence, but also for alleged unseaworthiness and for maintenance and cure. Jones Act claims do not give rise to *in rem* liability. *Plamals v. Pinar del Rio*, 277 U.S. 151 (1928). Claims for unseaworthiness and maintenance and cure, on the other hand, trigger potential *in rem* liability on the part of the vessel upon which the injury occurred. *The Osceola*, 189 U.S. 158 (1903).

At a later section of this brief, Waterman analyzes the degree of control that the United States exercised over the S/S MAJ. STEPHEN W. PLESS and shows that the degree of control was sufficient to render the United States, as charterer, liable for the alleged negligence of the crew of the S/S MAJ. STEPHEN W. PLESS. At this section of the brief, however, Waterman shows that the exclusivity of liability provisions of the Suits in Admiralty Act have been triggered by the plaintiff asserting claims that give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS.

Claims arising on vessels operated for the United States are subject to the Suits in Admiralty Act.

Section 741 of the Suits in Admiralty Act, 46 USC §741, applies to claims arising on board vessels that are owned by or operated for the United States of America: "No vessel owned by the United States... or operated by or for the United States... shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure... " 46

USC §741. (Emphasis added.) Privately owned vessels that have been time chartered to the United States and are being operated for the United States thus fall within the ambit of Section 741 just as do vessels that are owned by the United States. indeed, the Suits in Admiralty Act was adopted shortly after the end of World War I in order to overcome the inconvience and embarrassment of merchant vessels operated for the United States being subjected to arrest and attachment. See, Legislative history to the Suits in Admiralty Act, 66th Congress,1st Session, Senate Report No. 223 (September 27, 1919).

The Suits in Admiraltv Act has been construed by numerous courts as applying both to vessels owned by as well as those operated for the United States under time charter party arrangements. For example, in *Western Tankers Corp. v. USA,* 1975 AMC 775, 780 n. 10 (S.D. NY 1975), the court held that claims for unseaworthiness occurring aboard a vessel time chartered to the government were cognizable under the Suits in Admiralty Act: "Since the vessel was being operated by Western Tankers for the United States, as time charterer, and was carrying its oil, Perry could have sued the United States under the Suits in Admiralty Act, 46 USC section 741 et. seq., for his personal injuries due to the unseaworthiness of the vessel, even though she was manned, equipped and maintained by the owner. " Likewise, in *Burkholder v. United States,* 60 F. Supp. 700 (E.D. Penn. 1945) ("*Burkholder II*"), the court held that the Suits in Admiralty Act applies to claims occurring aboard vessels time chartered to the United States:

> "If the general purpose of the Suits in Admiralty Act be considered no reason is apparent to place ships time chartered by the United States outside its scope.

> The law was enacted 'for the purpose of relieving the United States from obstruction of its commercial traffic by seizure of merchant vessels owned by it or under its control...' *Kunglig Jarnvagsstyrelsen v. United States*, 2 Cir., 19 F.2d 761, 762. Vessels time chartered by the United States are instruments of the government's commercial traffic and, in respect of obstruction of such traffic, no distinction can be drawn between the inconvenience arising from the seizure of such vessels and the seizure of those owned by the United States or operated for it under agency agreements."

Burkholder II, 60 F.Supp. at 703.

The Suits in Admiralty Act was held to apply to claims arising out of conditions aboard a vessel time chartered to the government in *Peneiro v. United States*, 65 F.Supp. 191, 192 (N.D. Cal. 1945) ("*Peneiro II*"). In that case, the court held that the Suits in Admiralty Act imposes liability *in personam* upon the United States based upon the unseaworthiness of the GLORIA, a vessel time chartered to the United States:

> "Both the Senate and House Committee reports upon the bill, which later became the Suits in Admiralty Act, clearly indicate that the Congressional purpose was not solely to immunize the united States from seizure of government owned merchant vessels, but as well to eliminate the embarrassment and handicap of in rem admiralty proceedings against merchant vessels employed in the service of the United States. See House Report No, 497, page 3 and Senate Report No. 223, pages 1-3, accompanying S.3076, 66th Cong. 2d Sess. "

Peneiro II, 65 F. Supp. at 193, See also, *Epstein v. U. S.*, 86 F. Supp, 740 (S. D. N. Y. 1949), holding that a privately owned vessel time chartered to the United States was "operated for the United States" within the meaning of the Suits in Admiralty Act, 46 USC §741.

The above analysis of the text of §741 of the Suits in Admiralty Act, its legislative history, and the jurisprudence construing the Act demonstrates that the Suits in Admiralty Act encompasses admiralty claims arising aboard vessels that have been time chartered to the United States. The statute substitutes an in *personam* claim against the United States for claims that could give rise to *in rem* liability of vessels operated for or time chartered to the United States.

Claims that give rise to in rem liability on the part of a vessel being operated for the United States trigger application of the exclusivity of liability provisions of the Suits in Admiralty Act.

As noted above, the Suits in Admiralty Act was adopted so as to avoid the embarrassment and inconvenience of merchant vessels operated on behalf of the United States from being subjected to arrest or attachment proceedings in admiralty. By focusing upon whether the United States would have in *personam* liability as a purported time charterer, Anderson has overlooked the potential *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS created by his unseaworthiness and maintenance and cure claims. The pendency of these claims automatically triggers application of the Suits in Admiralty Act, 46 USC §742, Under that provision, an in *personam* remedy against the United States is substituted for admiralty claims that could give rise to *in rem* liability on the part of a vessel being

operated for or time chartered to the United States. Thus, in order to determine whether the exclusivity of liability provisions of the Suits in Admiralty Act have been triggered, it is not necessary to determine whether the United States would have in *personam* liability based upon its neglegent operation or control of a vessel that has been chartered to it: the Suits in Admiralty Act applies when a claim has been asserted that could give rise to *in rem* liability on the part of a vessel being operated for or on behalf of the United States. Concepts of negligence or operational control are irrelevant where a plaintiff has asserted unseaworthiness or maintenance and cure claims against a vessel being operated for the United States:

> "Since the vessel was being operated by Western Tankers for the United States, as time charterer, and was carrying its oil, Perry could have sued the United States under the Suits in Admiralty Act, 46 U.S.C. section 741 et. seq., for his personal injuries due to the unseaworthiness of the vessel, even though she was manned, equipped and maintained by the owner. "

Western Tankers Corp. v. U.S.A., 1975 A.M.C. 775, 780 n. 10 (S.D. NY t975).

Another case holding claims for unseaworthiness that give rise to *in rem* liability of a vessel time chartered to the United States trigger application of the exclusivity of liability provisions of the Suits in Admiralty Act was *Burkholder v. United States,* 56 F.Supp. 106 (E.D. Penn. 1944) ("*Burkholder I*"). The admiralty court in *Burkholder I* held that an unseaworthiness claim that gives rise to *in rem* liability on the part of the vessel is transferred by virtue of

the Suits in Admiralty Act to an in personam claim against the United States:

> "Were this suit based upon the general law of maritime tort, the libelant would have a right in rem against the ship if his cause of action was the unseaworthiness of the vessel. *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760. 1 do not question that, in such case his right of action would be transferred to the United States by the Suits in Admiralty Act.. "

Burkholder I, 56 F.Supp. at 109.

Yet another case holding that the Suits in Admiralty Act substitutes an in *personam* remedy against the United States for claims that could give rise to *in rem* liability on the part of a vessel time chartered to the United States is *Peneiro v. United States*, 65 F.Supp. 191 (N.D. Cal. 1945) ("*Peneiro II*"). The admiralty court in *Peneiro II* observed that in its first decision, *Peneiro I*, 62 F.Supp. 95 (N.D. Cal. 1945), the court had "expressly refrained from passing upon respondent's [the United States'] contention that the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C.A. section 741 et seq., does not impose liability in *personam* upon the United States based upon the unseaworthiness of a vessel time chartered to the United States, reserving decision on that question for the trial." Following the trial, the court issued its second opinion, *Peneiro II*, in which it held that the government assumes exclusive *in personam* liability by virtue of the Suits in Admiralty Act for unseaworthiness claims that arose aboard a vessel time chartered to the United States. In overruling the United States' exception, *Peneiro II* cited with approval to *Burkholder II*, 60 F.Supp. at 703, for the proposition that the Suits in Admiralty Act was designed to

substitute an *in personam* remedy against the United States for claims that could give rise to *in rem* liability.

Likewise, claims for maintenance and cure, that also are not rooted in concepts of negligence, and that, like claims of unseaworthiness, give rise to *in rem* liability, trigger the exclusivity of liability provisions of the Suits in Admiralty Act where the injury occurred aboard a vessel being operated for the United States:

> "The second cause of action [being asserted against the United States], for maintenance and cure, is maintainable. This right is a contractual right independent of the seaman's right to recover indemnity under the general maritime law or indemnity under the Jones Act. Since he would have had a right in rem against the ship prior to the passage of the Jones Act for maintenance, cure and wages, this cause of action will be transferred by the Suits in Admiralty Act to the United States.

Burkholder II, 60 F.Supp, 700, 702 (E.D. Penn., 1945).

Applying the above discussed law to the facts of this case reveals that the Suits in Admiralty Act has been triggered such that plaintiff has an in *personam* claim against the United States that is in lieu of any and all other claims he could have asserted against the Waterman Steamship Corporation. The S/S MAJ. STEPHEN W. PLESS was being operated for the Military Sealift Command, a part of the United States government. The vessel carried munitions, weapons, and other war materials. The United States has an interest in ensuring that such vessels are not arrested or subjected to attachment. The Suits in Admiralty Act substitutes

an *in personam* remedy against the United States for claims that Anderson may otherwise have had against Waterman Steamship Corporation, Pursuant to §745 of the Suits in Admiralty Act, 46 USC §745, "[Wlhere a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim..." In other words, by proving an *in personam* claim against the United States, the Suits in Admiralty Act mandates that such liability is exclusive such that Anderson is precluded from maintaining his claims against Waterman Steamship Corporation.

The availability of an *in personam* claim against the United States for the alleged unseaworthiness of the S/S MAJ. STEPHEN W. PLESS and for the plaintiff's maintenance and cure is not affected by the Fifth Circuit opinion discussed by plaintiff in his brief, *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5 th Cir. 1989). *Williams* did not create any new law; it merely reiterated legal principles that have governed claims brought by seamen injured aboard vessels operated for the United States subsequent to the 1919 enactment of the Suits in Admiralty Act. *Williams* merely observed that absent operational control, a time charterer is not liable for the negligence of an owner's employees. This principle was observed years earlier in *Burkholder I*, 56 F.Supp, 106, when the court noted that "[T]he charterer under a time charter is not liable to third persons for the torts of the owner or his agents... Certainly the Suits in Admiralty Act does not change the rule that the charterer under a time charter is not liable for the negligence of the owner's employees. That Act does not create new liabilities... The new remedy by libel *in personam* against the

United States which it gives lies only 'in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action.'" *Burkholder I*, 56 F. Supp. at 108.

Williams simply reiterates what had been held long ago in *Burkholder*, namely, that a time charterer who exercises no operational control is not liable for the negligence of the owner's employees.[2] *Williams* did not, however, alter the principle embodied in the Suits in Admiralty Act that an *in personam* remedy against the United States is substituted for claims that could give rise to in rem liability on the part of a vessel time chartered to or operated for the government. Indeed, there were no unseaworthiness or maintenance and cure claims at issue in *Williams*. The claims at issue in *Williams* sounded exclusively in negligence. 874 F.2d at 1059.

Since the plaintiff's claims in Williams were rooted exclusively in negligence theories, the Fifth Circuit analyzed the issue in terms of whether principles of maritime law would have allowed *Williams* to state a claim against a private person in the same position as the government, i.e. against a private time charterer. Finding that the United States exercised no operational control over the vessel, the Fifth Circuit held that *Williams* would have been unable to

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[2] The *Williams* rule is not followed by every court, and plaintiff concedes it is not binding on this Court. For example, without analyzing operational control, the Southern District of California held in a personal injury case involving a vessel time chartered to the United States, that "Plaintiff's exclusive remedy is against defendant, United States of America, pursuant to 46 USC §745." See, *Nakano v. United States and Vessel Charters, Inc.*, 1988 AMC 2220, 2221 (S.D. Cal. 1988).

state a claim against the United States as time charterer such that the Suits in Admiralty Act did not provide a remedy and §745's exclusivity provision therefore did not operate to bar suit against Central Gulf. The Fifth Circuit obviously did not have to consider the issue of whether unseaworthiness could have triggered in rem liability on the part of the S/S BAY, since Williams had asserted only Jones Act negligence claims that did not give rise to *in rem* liability. Williams therefore did not affect or alter the longstanding rule that the Suits in Admiralty Act substitutes an in personam remedy against the United States for claims that could give rise to in rem liability on the part of a vessel time chartered to or being operated for the United States.

Unlike Wilbert Williams, Herbert Anderson has elected to assert unseaworthiness and maintenance and cure claims that can give rise to *in rem* liability. Accordingly, this Court need not address the issue of whether the government exercised sufficient operational control over the S/S MAJ. STEPHEN W. PLESS so as to render it liable for negligence under the Jones Act, since Anderson's claims of unseaworthiness and maintenance and cure give rise to potential *in rem* liability on the part of the MAJ. STEPHEN W. PLESS, thereby automatically triggering application of the Suits in Admiralty Act that makes the United States exclusively liable in lieu of any claims against the operator of the vessel. Once the Suits in Admiralty Act is triggered, liability of the United States is exclusive in place of all claims arising out of the subject matter, 46 USC §745, such that Anderson's claims against Waterman Steamship Corporation are barred. Anderson must either proceed in federal court against the United States America, or not proceed at all. Waterman Steamship Corporation is shielded from liability by virtue of the exclusivity of liability provisions of §745 of the Suits in Admiralty Act.

THE UNITED STATES OF AMERICA EXERCISED SUFFICIENT OPERATIONAL CONTROL OVER THE S/S MAJ. STEPHEN W. PLESS AS TO RENDER IT EXCLUSIVELY LIABLE FOR ANDERSON'S CLAIMS

The above analysis demonstrates that the government is exclusively liable for Anderson's claims by virtue of the Suits in Admiralty Act because Anderson has alleged unseaworthiness and maintenance and cure claims that could give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS, a vessel being operated for the United States Military Sealift Command. The Suits in Admiralty Act substitutes an *in personam* claim against the United States for claims that could give rise to *in rem* liability on the part of a vessel being operated for the United States. Once the Suits in Admiralty Act is triggered, liability of the United States is exclusive in lieu of any claims against the operator of the vessel. Accordingly, it is not necessary to reach the issue of whether, if Anderson had brought purely negligence based theories, the United States would have been liable in personam as charterer of the S/S MAJ. STEPHEN W. PLESS.

Had the plaintiff asserted only a Jones Act negligence claim, and not also brought claims of unseaworthiness and maintenance and cure that automatically triggered application of the Suits in Admiralty Act, the analysis would focus upon whether the United States exercised operational control over the S/S MAJ. STEPHEN W. PLESS. The government did exercise operational control over the S/S MAJ. STEPHEN W. PLESS. Therefore, application of the Suits in Admiralty Act is triggered even if plaintiff had not also asserted unseaworthiness and maintenance and cure claims.

This case is therefore distinguishable from *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989), in which case "operational control did not shift from Central Gulf to the United States" such that, under the facts of that case, "the appellant would have been unable to state a claim against the United States as time charterer." *Williams*, 874 F.2d at 1063. The Fifth Circuit observed that "the term 'control' as used by this court in formulating this general rule [that a time charterer who has no control over the vessel assumes no liability for negligence] refers to operational control of the vessel, not ultimate control of its destination or cargoes. " Williams, 874 F.2d at 1062.

In opposing the exceptions filed by Waterman, plaintiff has mischaracterized the nature of the government's control over the S/S MAJ. STEPHEN W. PLESS as being limited merely to directing "the destination of the vessel or the ultimate destination of the cargo..." Plaintiffs opposition memorandum at p. 19. In fact, the type of control exercised by the United States Military Sealift Command went far beyond that of a normal time charter arrangement wherein a party hires a vessel to transport cargo from one port to another. Unlike a typical time charterer that simply hires the vessel to transport cargo, the United States of America has been given the right to install on the S/S MAJ. STEPHEN W. PLESS any defensive armament... the government deems necessary." *See*, Affidavit of Peter M. Johnston at paragraph 6. Normal time charterers do not have the right to make structural modifications to the vessel being time chartered. This is an element of control that distinguishes the relationship between the United States of America and Waterman from that between a typical time charterer and a vessel owner.

The government also has the ability to exercise control over which crew members can serve aboard the S/S MAJ. STEPHEN W. PLESS. Unlike a typical time charterer that simply hires a vessel to transport cargo, and does not dictate to the vessel owner what crew members will be authorized to serve aboard the ship, the United States Government requires that the master, chief officer, and radio officer who will work aboard the S/S MAJ. STEPHEN W. PLESS must be qualified for a United States Government "secret" security clearance, and all other officers must be qualified for a United States Government "confidential" security clearance. Additionally, the United States requires that all crew members who will serve aboard the S/S MAJ. STEPHEN W. PLESS must be United States citizens. *See*, Affidavit of Peter M. Johnston at paragraph 7. This type of crew control exercised by the United States extends beyond the normal "hire a boat and tell it where to deliver the cargo" time charter situation.

Extending its operational control beyond simple directions of what cargo should be transported and to what port the cargo should be delivered, the United States controls when the S/S MAJ. STEPHEN W. PLESS is entitled to refuel, and where the source of the fuel will be. See, Affidavit of Peter M. Johnston at paragraph 16. A typical time charterer does not concern itself with issues of when or where the vessel being hired to transport cargo will refuel. The government, exerts operational control over the S/S MAJ. STEPHEN W. PLESS by being able to restrict when and where the vessel can refuel itself.

In a normal time charter situation, the time charterer that has hired the vessel to deliver cargo has no inherent right to select husbanding agents at overseas ports. In the

case of the S/S MAJ. STEPHEN W. PLESS, however, the United States Government has asserted the right to disapprove any proposed husbanding agents at overseas ports. See, Affidavit of Peter M. Johnston at paragraph 17. By limiting the right of Waterman Steamship Corporation to select its own husbanding agents, the Military Sealift Command has exercised operational control over the S/S MAJ. STEPHEN W. PLESS that extends far beyond that of a typical time charter party.

A normal time charterer has the right to direct what cargo will be carried, and to which port the cargo will be delivered, but does not have the right to assign its own personnel to work aboard the vessel. In the case of the S/S MAJ. STEPHEN W. PLESS, however, the United States Government has asserted the right to assign military personnel in the employ of the United States Armed Forces to board the vessel and to load, stow, and maintain explosives that the S/S MAJ. STEPHEN W. PLESS carries as a part of its function as a preposition supply ship subject to the orders of the Military Sealift Command. See, Affidavit of Peter M. Johnston at paragraphs 3 and 19. Additionally, the government has the right to assign security forces that are part of the United States military to work aboard the vessel. See, Affidavit of Peter M. Johnston at paragraph 27.

Unlike a typical time charter arrangement where the cargo owner simply hires the vessel to transport cargo from one place to another, the United States Government requires that the S/S MAJ. STEPHEN W. PLESS be operated and maintained accordingly to highly detailed and specific standards promulgated by the Military Sealift Command. See, Affidavit of Peter M. Johnston at paragraph 25. These standards affect minute operational details including operation of refrigeration units such as the one in which Herbert

Anderson allegedly was injured. For example, an inspection conducted by the COMPSRON ONE engineering/material officer on August 6, 1996 observed that in the refrigeration room, the reefer strainer valve is weeping seawater and corroding deck beneath. Requires rework and preservation. " See, Affidavit of Peter M. Johnston at paragraph 25. Typical time charterers do not concern themselves with whether a deck in a refrigerator on a time chartered vessel may be corroding; a typical time charterer is concerned only with getting cargo safely delivered from one port to the next.

The S/S MAJ. STEPHEN W. PLESS "is subject to a variety of operational controls imposed by the MSC Commodore." *See, Affidavit of Peter M. Johnston at paragraph 26.* Plaintiff has not introduced any evidence rebutting the operational control that is, in fact, exercised by the Military Sealift Command. Instead, plaintiff has argued that because the charter party is labeled a "time charter" party, therefore, ipso facto, the government does not exercise the requisite operational control to subject it to liability. Once again, the plaintiff's analysis is hollow. As was observed in *Burkholder I,* 56 F.Supp. at 109, "[T]he mere fact that the charter calls itself a time charter... does not conclusively determine its character, " *Burkholder I,* 56 F.Supp. at 108. The key issue is not the label given to the charter party, but the degree of operational control in fact exercised by the United States of America. Williams, 874 F.2d at 1062; *Favorite v. Marine Personnel and Provisioning, Inc.*, 955 F.2d 382, 387 (5" Cir. 1992). The affidavit of Peter M. Johnston adequately demonstrates the degree of operational control that the Military Sealift Command exercises over the S/S MAJ. STEPHEN W. PLESS. Plaintiff has not challenged any of the factual statements set forth in Mr. Johnston's affidavit.

CONCLUSION

Liability on the part of the United States is triggered in this case by virtue of the operational control the United States exercises over the S/S/ MAJ. STEPHEN W. PLESS, which subjects the United States to in personam liability notwithstanding the fact that the charter party is labeled a "time charter". Additionally, an *in personam* remedy against the United States is substituted for claims of unseaworthiness and maintenance and cure that would otherwise give rise to *in rem* liability with the attendant right to seize a vessel that carries munitions for the Military Sealift Command. Once liability on the part of the United States has attached, whether by virtue of its operational control that subjects it to liability for Jones Act negligence, or by virtue of claims having been asserted that could give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS, the *in personam* liability of the United States of America is exclusive in place of any liability on the part of the operator of the vessel. See, 46 USC §745.

Plaintiff has sued the wrong party. His claims should be directed against the United States of America, and should be brought in federal district court.

WHEREFORE, the Exception of No Right of Action or No Cause of Action should be SUSTAINED, or, alternatively, summary judgment should be GRANTED.

NEW ORLEANS, LOUISIANA, this 8th day of July 1999.

Respectfully submitted:

/s/ John R. Fitzgerald
MICHAEL L. McALPHINE (#9195)
JOHN R. FITZGERALD (#16916)
McALPINE, PEULER & COZAD
901 S. Peters Street, Suite 300
New Orleans, LA 70130
Phone: (504) 561-0323;
Fax: 528-9442
Attorneys for
Waterman Steamship Corp.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 8th day of July, 1999 served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first clasws postage prepaid.

/s/ John Fitzgerald

APPENDIX 5

44056/JRF/lrnr 0032-5573

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS STATE OF LOUISIANA

NO.: 97-07697 DIVISION "F"

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, came and personally appeared,

PETER M. JOHNSTON,

who, after being administered an oath, did testify as follows:

1. I am the Vice President of Operations for Waterman Steamship Corporation.

2. I have personal knowledge of the matters set forth herein.

3. The steamship MAJOR STEPHEN PLESS, upon which Herbert Anderson contends he was injured, is operated exclusively for and on behalf of the United States Government, Department of Defense as a pre-positioned supply ship that is subject to the orders of the Military Sealift Command (MSC). T'he vessel is used to carry ammunition and equipment for support of a specially organized Marine Amphibious Brigade (MAB) to enhance rapid deployment of the United States Marine forces.

4. The cargo carried by the MAJOR STEPHEN PLESS is exclusively military,

5. The MAJOR STEPHEN PLESS is an Afloat Prepositioning Force ("APF") ship.

6. The United States Government has the right to install on the MAJOR STEPHEN PLESS any defensive armament (including demagnetization by installed equipment or other process) the Government deems necessary.

7. The Government requires that the master, chief officer, and radio officer must be qualified for a United States Government "Secret" security clearance. All officers must be qualified for a United States Government "Confidential" security clearance. In addition, all of the crew members of the MAJOR STEPHEN PLESS and all officers must be United States citizens.

8. At the time of the alleged accident on May 1, 1996, the MAJOR STEPHEN was operating on behalf of the Military Sealift Command off the Coast of Spain.

9. Days during which the MAJOR STEPHEN PLESS is in foreign ports is counted as time used by a military ship pursuant to applicable Status of Forces agreements to the same extent that time is counted while an aircraft carrier or destroyer is in a foreign port. In other words, if the United States Government has negotiated permission to use a foreign port for its military vessels for 100 days per year, a day at which the MAJOR STEPHEN PLESS is in the foreign port counts against that total to the same extent as would any United States naval warship.

10. The Commander of Military, Sealift Command (COMSC) has promulgated MSC Force Operating and Administrative Instructions that are applicable to the prepositioned supply ship MAJOR STEPHEN PLESS pursuant to COMSC Instruction 3121-9.

11. The Standard Operating Manual (SOM) promulgated by the MSC pursuant to COMSC Instruction 3121.9 reflects that COMSC duties and responsibilities, as specified by the Chief of Naval Operations (CNO) include the duty to "operate and administer government-owned ships assigned, and all other ships acquired for the purpose of providing ocean transportation (sealift) services for the movement of personnel, materialsi and petroleum, oil, and lubricants (POL)."

12. The SOM promulgated by the COMSC mandates that "All ships in the service of MSC, whether U.S. Government-owned, are boat chartered, time or voyage-chartered, are in exclusive government non-commercial service. Each of these ships is entitled to full soverign immunity." The SOM further mandates that "This means such ships are, *inter alia*, immune from arrest and search,

whether in foreign internal or territorial waters or on the high seas; immune from all foreign taxation; exempt from any foreign state regulation requiring flying the flag of such foreign state either in its ports or while passing through its territorial sea; and entitled to exclusive control over persons on board such ships with respect to acts performed on board."

13. Sailing orders for the MAJOR STEPHEN PLESS are issued by the MSC. An example of sailing oders that the MSC has issued to the MAJOR STEPHEN PLESS are attached hereto.

14. The Military Sealift Command exercises operational control over the MAJOR STEPHEN PLESS in a number of ways.

15. Sailing orders for the MAJOR STEPHEN PLESS are issued by the Commander of the Maritime Prepositioning Ships, Squadron 1.

16. The MSC issues orders instructing when the vessel will be refueled and where the source of the fuel will be.

17. The United States Government has the right to disapprove any proposed husbanding agents at overseas ports.

18. Overhaul, drydocking, and repairs to the MAJOR STEPHEN PLESS involving an expenditure of more than $50,000.00 are not made unless approved in advance by the MSC.

19. The United States Governent has the right to assign military personnel in the employ of the United States Armed Forces aboard the vessel to load, stow, and maintain explosives.

20. The MSC arranges for port clearances at all foreign ports.

21. The MSC often orders that the MAJOR STEPHEN PLESS go out on convoys with military units and participate in military exercises.

22. The MSC frequently orders that military personnel be placed aboard the MAJOR STEPHEN PLESS.

23. Security forces that are part of the United States Military are very often assigned to work aboard the vessel.

24. The MAJOR STEPHEN PLESS is listed in Jane's Fighting Ships in the category of the Military Sealift Command.

25. The MSC Commodore, a Navy captain who is the on-scene MSC representative, regularly inspects the MAJOR STEPHEN PLESS to ensure that the vessel is being operated and maintained according to standards promulgated by the MSC. A sample Informal Material Inspection ("IMI") demonstrating the extent of the MSC's operational control ("OPCON") of the MAJOR STEPHEN PLESS is attached hereto. The IMI, conducted 06 August 1996 while at anchor in Souda, GR, was conducted by the COMPSRON ONE engineering/material officer, who observed that discrepancies have been corrected in the top side electrical and

Q. 1. Aviation Facility flight deck light sequencer electrical box, preservation work was completed in the bulkhead of the engine room upper level port side aft, but that, in the refrigerator rooms, the "reefer strainer valve is weeping sea water and corroding deck beneath. Requires rework and preservation."

26. Unlike private commercial operations where a vessel is merely instructed to carry cargo from one port to another, the MAJOR STEPHEN PLESS is subject to a variety of operational controls imposed by the MSC Commodore.

FURTHER YOUR AFFLANT SAYETH NOT.

/s/ Peter M. Johnson
PETER M. JOHNSON

SWORN TO AND SUBSCRIBED BEFORE ME, THIS 2nd DAY OF December, 1998.

/s/ Robert B. Azouls, III
NOTARY PUBLIC

P. SECURITY (All entries must be completed)

1. TYPE OF STORAGE CONTAINER USED (Check One)

(X) a. Steel safe cabinet fitted with a three-number combination lock.

( ) b. Steel cabinet secured by a steel bar and a three-numer combination padlock.

( ) c. Non of the above (If this safe is checked, and care type of locking source, manner on which contractor is opened and secured and other information keemed appropriate.)

2. MANUFACTURERS NAME AND NUMBER OF THE SAFE OR PADLOCK (If available)

MOSLER GSA APPROVED

3. SIZE OF CONTAINER (Height, width, depth)

12" X 16" X 20"

4. INDICATE PLACE WHERE SECURITY CONTAINER IS LOCATED

SECURE COMM CENTER

( ) MOST SHIPBOARD PERSONNEL HAVE FREE ACCESS TO THIS AREA.

(X) SHIPBOARD PERSONNEL ARE RESTRICTED FROM THIS AREA

5. LIST NAMES AND BALLETS OF ALL PERSONNEL HAVING ACCESS TO CONTENTS OF CONTAINER

Walter E. Shea, Chief Mate
James F. Ronan, Radio Operator

REMARKS (Cor. recommened)(Identify by stem designator, e.g., A.I.)

6. MATERIAL CONDITION OF SECURITY CONTAINER	yes	no
a. All drawers operate smoothly	X	
b. All drawers remain firmly secure when safe is locked (secure safe and attempt to open)	X	
c. Interior of safe contain a fire resistant material(i.e., asbestos, cement)	X	
d. Physicial appearance of safe indicates measure of maltreatment		X
e. Because of container's size and weight, is at portable (i.e. able to be easly moved from its present location)		X
f. Has custodian had any problems concerning opening and securing safe which would indicate some type of physicial malfunction (If yes, has corrective action been installed and help?)(Explain on "Remarks"below.)		X
7. WHEN OPEN (and classified material is not) IS SECURITY CONTAINER KEPT UNDER CONSTANT SURVEILLANCE?	X	
8. IS THE COMBINATION TO THE SECURITY CONTAINER CHANGED AT LEAST ONCE A YEAR ALSO EACH TIME THERE IS A CHANGE OF CUSTODIAN?	X	
9. DOES THE COMPLAINT HEADQUARTERS PROMULGATE INFORMATION CONCERNING REQUIRED SECURITY PRACTICES AND PROCEDURES GOVERNING THE STORAGE AND HANDLING ÔF CLASSIFIED MATERIAL?(If yes, how is this done?)(explain on "Remarks" below.)	X	

Q. Miscellaneous	
ITEM	**Condition**
1. Aviation Faculity	S
2. Portable water tanks	NI
3. Bunker tanks	NI
4. Feedwater tanks	NI
5. Cordage or cargo space aft	S
GENERAL CONDITION OF SHIP	**S**

INFORMAL MATERIAL INSPECTION
SS MAJ STEPHEN W PLESS

An informal material inspection of the SS Pless was conducted o6 Aug 1996 while at anchor in Souda, GR. The inspection was conducted by the COMPSRON ONE Engineering/Material Officer. SS Pless is scheduled to complete its 30 month MPF Maintenance Cycle (MMC-5) in spring 1997. Work packages have been submitted for jobs to be done during shipyard overhaul. Overall the ship is in satisfactory condition.

The following discrepancies have been corrected since the last report (items corrected on last report have been deleted):

A.14 TOPSIDE ELECTRIACAL and Q.1 AVIATION FACILITY. Flight Deck Light Sequencer Electrical Box mounted under the flight deck has been protected with preservative paint used around pump foundations in engineering spaces. Appears to have stopped corrosion issue.

F.I. ENGINE ROOM. Preservation work has been completed on overhead and bulkheads of Engine Room upper level port side aft.

The following items are still applicable since last inspection:

B.1. SHIP SIDES. Running rust beneath exhaust plenums indicates possible corrosion within plenums. Scheduled for overhaul in MMC-5.

Q.5- CORDAGE/ DUNNAGE. While back-loading causeway sections following NSE training in March 96, a hole was punctured in bottom of CSP 69-163 by a steel padeye on dunnage used between causeway sections. BEACH GROUP repaired causeway section, however recommend removing/ relocating lifting padeyes on dunnage to prevent similar problems in the future. Recommend consulting cargo handlers from CRAP GROUP for acceptable modifications.

The following items are additions since last Inspection:

A.4 RAILS. Ship's force has identified and marked various corroded topside rails to be replaced as part of MMC-5 work package.

A.5 DECK FITTINGS.Remote valve operators for fire damper and DFM valves port side aft require preservation. Starboard anchor washdown valve in forecastle requires preservation.

E.8 REFRIGERATOR ROOMS. Reefer strainer valve is weeping seawater and corroding deck beneath. Requires rework and preservation.

F. ENGINEERING SPACES. Excellent preservation in Engine Room. Last area to be completed is after bulkhead, which is primed with paintingion progress.

H.I BOILERS. DC Heater Relief Valve in uptake space has lifted in past and requires preservation due to escaping steam corrosion.

P.9 SECURITY. Information regarding COMSEC handling is delineated and distributed via COMP-SRON instruction.

N.3 and 4 PUBLICATIONS. Editions held: NTP-10C (10D is in affect), and NWP-14D.

Cooperation afforded the inspector during the inspection was out-standing and greatly appreciated.

Signature
illegible

TITLE
COMMANDER, MPSRON
ONE

INFORMAL MATERIAL INSPECTION
C FORM 4738/3 (Rev. 6-78)

(Name of Command)	To:		Date & Time of Inspection
COMPSRON	**Comsc. Wash.DC**		**06Aug96/0830**
Name of Ship SS MAJ STEP. W. PLESS	Location Souda Gr	Date of Last Overhaul AUG 94	Date of Report 15Aug96

INSTRUCTIONS

1. Use the following designations in 'CONDITION' column: E--Excellent: S--Satisfactory: U--Unsatisfactory.

2. Alongside U--ratings indicate corrective action to be taken by using the terms SF--for ships force: R--for urgent items to be included in requests for voyage repairs of requisitions for supplies: and D--for non-urgent items be corrected at the next overhaul or repair period. Example U--SF

3. Use NA--for not applicable: NI--for not Inspected.

4. Use backs of form for comments(particularly on items marked U) recommendations, suggestions, improved conditions noted, ect.

DISTRIBUTION: Original and one copy to COMSC; one copy to contract operator; one copy to MSC area commander in which inspection performed; one copy to Inspector's file; one copy to tanker before leaving port if possible. A letter of transmittal is not required.

NOTE: This report represents the material condition as found by visual inspection, and information from ship's officers when deficiencies other

This form may be completed by typewriter or manually

A. TOPSIDE	
ITEM	**Condition**
1. Main deck	S
2. All other weather and outside decks	S
3. Catwalks	S
4. Bulwarks, rails, lifelines	S
5. Deck fittings	S
6. Deck winches and capstans	S
7. Anchor windlass, anchors, chains	S
8. Booms and rigging	S
9. Cargo piping	S
10. Stream piping (lagging not req'd accept adjacent to machinery)	S
11. Accommodation ladder and gangway	S
12. Ladders	S
13. Superstructures and houses (exterior)	S
14. Electrical cable (exposed)	S

B. SHIP SIDES	Condition
1. Hull exterior	S
a. Paint	S
b. Indentations	S
C. FORWARD STORAGE	**Condition**
1. Lockers	E
2. Paint Locker	S
3. Dry cargo locker	E
4. Chain locker	NI
D. AMOIDSHIP HOUSE	
1. Passageways	E
2. Living Spaces	E
3. Wheel house	E
4. Chart room	E
5. Radio room	E
6. Ships office	E
7. Lounge	E
8. Wash rooms	E
9. Hospital	E
10. Shelter deck area	E

E. AFTER HOUSE	Condition
1. Passageways	E
2. Living spaces	E
3. Dining rooms	E
4. Crew lounge	E
5. Wash rooms	E
6. Galley	E
7. Pantry	E
8. Refrigeration rooms	S
9. Steward store rooms and spaces	E
10. laundry	E
F. ENGINEERING SPACES	
1 . Engine room	E
a. Gratings, ladders, floor plates	E
b. Bildges	S
2. Boiler rooms	E
a. Gratings, ladders, floor plates	E
b. Bildges	S
3. Feed pump room	E
a. Gratings, ladders, floor plates	E
b. Bildges	S
4. Store rooms. machine shop, etc.	E
5. Shaft alley	E
6. Steering gear flat	E
7. Emergency diesel generator room	E
G. PUMP ROOMS	
1. Fwd cargo pump room	S

	Condition
a. General cleanliness and appearance	S
b. Gratings, ladders, floor plates	S
c. Bildges	S
2. Aft cargo pump room	S
a. General cleanliness and appearance	S
b. Gratings, ladders, floor plates	S
c. Bildges	S
H. MACHINERY & EQUIPMENT	
1. Boilers - main, auidliary, waste heat	S
2. Copdensers	S
3. Evaporators	S
4. S. S. generators	S
5. Shaft driven generatur	S
6. Main lurlinols)	S
7. Muin diesel engines	NA
8. Feed pumps	S
9. Cargo pumps	S
10. Stripping pumps	S
11. Circulating pumps	S
12. Eductors	S
13. Propeller	N I
14. Propeller shafting	E
15, Tank cleaning machines (note number aboard, condition of each)	NA
16. Heaters	NA
17. Coppus blowers	S
18. Adequacy of spare parts	E
19. Machinery history (upt4~date)	S

I. SAFETY FEATURES	Condition
1 . Watertight loors	E
2. Fire extinguishers	E
3. Fire hoses, nozzles, and axes	S
4. Fire mains	S
5. Fire &- bilge pumps	S
6. Steam smothering system	S
7. C02 equipment	E
8. Lifeboats, davits, falls, and ladders	S
9. Life preservers and life ring buoys	S
10. Rescue breathing apparatus	E
11. Helmets	E
12. No bafety hazards	E
13. Safety signs and warnings	E
J. CARGO TANKS	
I . Scale condition	NI
2. Coating condition	NI
3. Piping	S
4. Cargo valves, reach rods, and wheels	S
5. Cargo venting sy-stern	S
6. Heating coils	NA
7. Ladders	NI
K. FURELING AT SEA STATIONS	
I . Hoses, quick release couplings, quick closing valves	E
2. Telephone head sets, portable electric megaphone	E
3. F enders	S

L. COMMUNICATIONS	Condition
I . Radio transmitter, receivor, auto alarm	E
2. Radioaitenna system	E
3. Intercommunication system	E
4. Adequacy of spare parts	E
M. NAVIGATION	
1. Fathometer	E
2. Compasses	E
3. Radar	S
4. Loran	E
5. Radio detection finder	E
7. Adequacy of spare parts	E
N. PUBLICATIONS	
1 . TANKOPINS (Edition held)	NA
2. NTP-9 (Edition, held)	NA
3. NTP- IOB (Edition held)	S
4. NWP - 14 (Edition held)	S
5. Any 5 other pubs, req'd by COMSCINST 3121.3	S
6. Envelope 'ALFA'	NA
O. PERSONNEL	
1. Appearance & conduct	E
2. Cooperation between departments	E
3. Cooperation in assisting with this inspection	E

49614041 WACOR UD
NCS SDN

2468
1251 09/13 24682168 NCSX2609
00907

HSG 907
P R 131232Z SEP 95
TO RUWMUA/MV 2ND LT JOHN P BOBO
RUWMBUA/SS MAJ STEPHEN W PLESS
INFO RHDLCNE/CINCUSNAVEUR LONDON UK//113/
RULSMSC/COMSC WASHINGTON DC//N3//
RUFRQJQ/COMSIXTHELT
RULYVBA/COMSECONDFLT
RUCKMAC/RUCBLFA/COMMARFOREUR//G3/G4//
RUCKMAA/RUCBLFA/COMMARFORLANT//G3/G4//
RUCKMEA/CG 11 MEF//G3/G4/G8//
RUOOVKA/RULYGOA/COMPHIBGRU Two
RUCBFDI/COMNAVBEACHGRU TWO
RHDLPEA/COMSCEUR LONDON UK//N3//
RHDLPGJ/CYF SIX THREE
RHCFMCC/COMPSRON ONE
RUWMBUA/ISS SGT MATEJ KOCAK
RUWMBUA/SS PFC EUGENE A OBREGON
RUWMBUA/NAVCOMTELSTA INMARSAT TERM
SAN DIEGO CA/WATERMAN
STEAMSHIP CORP NEW ORLEANS LA/TLX
49614041//
AMERICAN OVERSEAS MARINE CORP QUIN-
CY MA/TLX
6731749//
BT
UNCLAS //N03000//

USGID/ORDER/CTG SIX THREE PT EIGHT//
ORDTYP/OTR//
AMPN/SAILORD//
TIMEZONE/L//
AMPN/ALL TIMES LOCAL UNLESS OTHERWISE DIRECTED//
GENTEXT/EXECUTION/1. ON 18 SEP. MV BOBO/SS PLESS GET UNDERWAY FROM
POTHUAU, FR AND TRANSIT TO SOUDA BAY. G.R TO ARRIVE 21 SEP.
2. SUBBMIT MOVREP, DAILY POSITION REPORT, FUEL REPORTS- WEAX OBSERVATIONS AS REQUIRED.
3. DIP CLNC IS PENDING. WILL ADVISE WHEN APPROVED.
4. MV BOBO AND SS PLESS ACKNOWLED)GE RECEIPT OF THIS MESSAGE.//
BT
NC3 SDN

49614041 WACOR UD
ZHR UUUUU
P 130816Z SEP 95
FM SS MAJ STEPHEN W PLESS
TO COMSCMED HAPLES IT
INFO COMPSR0N ONE
MV 2ND LT JOHN P. BOBO
BT
UNCLAS/H00000
SUBJ/SAILORD//
AMKS/1. REQ. SAILORSBE PROVIl ED ASAP TO SS PLESS AND MV BOBO
FOR NEXT SCHEDULED MOVEMENT.
BT

WSC Inbound

From: mhslwu/0 TLX-originator
To: WSCIN
Subject: 49614041 WACOR UD
Date: 18 of November,1996 14:28

49614041 WACOR UD
NCS SDN

7178
0923 11/18 25057372 NCSX7182
0035296

MSG 35296
P 181240Z NOV 96
FM COMPSRON ONE
TO RUWMBUA/SS STEPHEN W PLESS
RUWMBUA/SS PFC EUG
ZEN/MV 2ND LT JOHN P BOBO
INFO RUFRQJQ/COMSIXTHFLT
RULSMSCICOMSC WASHINGTON DC//PM3/PM31
/PM31 1
RUCKMACICOMMARFOREUR
RUFGFMC/HQ MARFOREUR BOEBLINGEN GEI/G3//
RHDLPGJ/CTF SIX THREE
RHDLPEA/COMSCEUR LONDON UK//N3/1
RHDLPGK/COMSCMED NAPLES IT//N3//
RHDLPUV/NAVSTA ROTA SP//PORTI/
RUWMBUA/SS SGT MATEJ KOCAK
RULSRMA/MV AMERICAN MERLIN
RUWMBUA/NAVCOMTELSTA INMARSAT TERM SAN
DIEGO CA

WATERMAN STEAMSHIP CORP NEW ORLEANS LA/[TLX 49614041//
RUWMBUA/AMSEA QUINCY MA
BT
UNCLASHN/03000//
MSGID/ORDER/COMPSRON ONE/0359/NOV//
ORDTYP/OTR//
AMPN/SAILORD//
TIMEZONE/L//
AMPN/ALL TIMES LOCAL UNLESS OTHERWISE INDICATED//
GENTEXTIEXECUTION//
RMKS11. SS PLESS DEPART SOUDA BAY , GR 23NOV96 FOR PARTICIPATION
IN EXER NIRIIS 96. UPON COMPLETION OF EXER , PROCEED ENR SOUDA
BAY, GR TO ARR 25NOV96. SUBMIT MOVREP, PREREP, DAILY 0800
POSITION/FUEL REPORTS AND WEAX REPORTS IAW MED OPERATING PROCEDURE.
2. SS OBREGON/MV BOBO DEPART ROTA, SP 02DEC96 AND PROCEED ENR
BARCELONA, SP TO ARR 05DEC96. COMPSRON ONE WILL SUBMIT MOVREP AND
LOGREQ FOR BOTH VESSELS. MV BOBO SUBMIT WEAX REPORTS. SS
OBREGON/MV BOBO SUBMIT DAILY 0800 POSITION REPORTS. SS
3. COMPSRON ONE WILL ADVISE UPON APPROVAL
OF DIPLOMATIC CLEARANCE.
4. SS PLESS/SS OBREGON ACKNOWLEDGE RECEIPT
OF THIS SAILORD.//
BT
NCS SDN
49614041 WACOR UD

APPENDIX 6

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

Filed APR 30 '97

N 0.: 97-7697 DIVISION "F"

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel plaintiff, Herbert Anderson, a person of the full age of majority, a resident and domiciliary of the Parish of Orleans, State of Louisiana, respectfully represent,:

I.

Made defendant herein is Waterman Steamship Corporation, a foreign corporation, authorized to do and/or actually doing business in the Parish of Orleans, State of Louisiana, and within the jurisdiction and venue of this Honorable court.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was employed by defendant, Waterman Steamship Corporation, as a Seaman and Assistant Cook Utility of the crew and permanently assigned to a vessel or fleet of vessels in navigation that were owned and operated by defendant, Waterman Steamship Corporation, which vessels include the S.S. MAJ. STEPHEN W. PLESS.

III.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was engaged in the course and scope of his employment aboard the MAJ. STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

IV.

On or about May 1, 1996, petitioner was caused by defendant to sustain injuries to his psyche and body as a result of the negligent acts of defendant, and its agents, servants, employees, and the unseaworthiness of the vessels under its custody and control.

V.

On or about May 1, 1996, petitioner, while employed as an Assistant Cook Utility aboard the S. S. MAJ. STEPHEN W. PLESS, was working in the meat box of the galley with the steward when he was caused to trip, slip or otherwise fall over an object on the floor and into a rack or shelf in the galley.

VI.

As a result of the foregoing accident, petitioner was caused to sustain injury to his shoulder and back, including but not limited to, a disc injury and possible tendon perforation of the right shoulder, as well as other parts of his body, the full residuals of such injuries are unknown but severe.

VII.

Following the accident, defendant paid petitioner maintenance and cure benefits for a period of time. However, defendant terminated payment of those benefits without lawful authority and despite demand, has arbitrarily and capriciously failed and/or refused to reinstate payment of plaintiff's maintenance and cure benefits.

VIII.

Pursuant to the subject matter of this lawsuit as set forth herein, defendant is liable to petitioners as follows:

IX.

COUNT ONE

The aforesaid injuries to the petitioner were directly and proximately caused by the negligent acts of commission and/or omission on the part of defendant, Waterman Steamship Corporation including, but not limited to, defendant's failure to provide petitioner, as its employee, with a reasonably safe place to work, and failure to assign petitioner to a seaworthy vessel or fleet of vessels, its failure to warn petitioner of impending dangerous perils, its failure to

provide petitioner with sufficient assistance form crewmembers which would have enabled him to perform his assigned work with a reasonable degree of safety, failure of its superior officers to supervise or to be attentive with respect to the operation underway at the time petitioner was injured, and other negligent acts of commission and/or omission as will be shown at the trial of this matter.

X.

SECOND COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove, additionally, and/or in the alternative, alleges that defendant, Waterman Steamship Corporation, is liable to petitioner under the General Maritime Law for breach of the warranty of seaworthiness, extending to the vessel or vessels involved herein, including but not limited to, the S.S. MAJ. STEPHEN W. PLESS. The aforesaid injuries suffered by the petitioner were also directly and proximately caused by the unseaworthiness of the defendant's vessels, including but not limited to, the defendant subjecting petitioner to injury as a result of an inadequate and/or incompetent crew and its failure to furnish the tools, co-workers, or equipment necessary for petitioner to perform his duties in a reasonably safe manner, all which caused the injuries sustained by petitioner.

XI.

THIRD COUNT

In addition, petitioner, while reiterating and realleging each and every allegation made hereinabove, alleges that

he was injured performing work as a Seaman and as a member of the crew of a vessel and/or vessels in the employment of Waterman Steamship Corporation, and sustained the injuries complained of in the service of the vessel and/or vessels, so as to be entitled to maintenance and cure, both past and future, until such time as he in fact reaches maximum cure, as well as entitlement to damages and attorney's fees for defendant's arbitrary and capricious termination of his maintenance and cure.

XII.

FOURTH COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove additionally alleges that as a result of defendant's refusal to provide maintenance and cure, petitioner's injuries have worsened, his ultimate physical recovery has been delayed, and he has been caused to suffer pain and mental anguish that he oterwise would not have incurred.

XIII.

As a direct result of the aforesaid incident and the negligence of the defendant, Waterman Steamship Corporation, as well as the unseaworthiness of the defendant's vessels and defendant's refusal to furnish maintenance and cure to petitioner, Herbert Anderson, has suffered severe physical pain and keen mental anguish, has undergone medical treatment, has lost substantial sums of money he otherwise would have earned, has been disabled from and/or severely handicapped in his pursuit of gainful employment and other daily activities, and these conditions may

continue, worsen, or become permanent in time, and the full residuals may be severe; all of which entitles petitioner to all damages which are reasonable under the circumstances for past, present, and future pain, suffering and mental anguish; disability; past and future loss of wages, including impairment of earning capacity; past and future medical expenses, past and future maintenance, and lost of life's pleasures. Petitioner's claims exceed the requisite amount for this court's subject matter jurisdiction.

XIV.

Petitioner's injuries and resulting damages were legally and proximately caused by the fault, including the negligence, of the defendant, its officers, agents, employees, and those for whom it is legally responsible, as well as by reason of the unseaworthiness of the S. S. NLAJ. STEPHEN W. PLESS. The claims against defendant are asserted by petitioner as a seaman under the Jones Act, 46 U.S.C. § 688, under the substantive provisions of the general maritime law of the United States, including the warranty of seaworthiness, which has been breached by defendant herein, and under any other federal or state statute which may be applicable. The jurisdiction of this court is premised on the "savings to suitors" clause. In the alternative, and only in the alternative, that petitioner is held not to be a seaman within the meaning of the Jones Act, petitioner alleges that he is entitled to recover from defendant for negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act and/or the law of the State of Louisiana.

XV.

Petitioner prays that he be declared a Seaman by this court.

XVI.

Petitioner is entitled to and prays for a trial by jury.

WHEREFORE, petitioner, Herbert Anderson, respectfully prays that defendant be served with a copy of this petition and be duly cited to appear and to answer, and that, after legal delays and due proceedings had, there be judgment herein in favor of petitioner, Herbert Anderson, and against defendant, Waterman Steamship Corporation, for all damages as are reasonable under the premises. Petitioner additionally prays for such amounts as the court may deem fit for continuing maintenance and cure payments and attorney's fees and petitioner further prays for legal interest on all said amounts, including pre-judgment interest, until paid in full, as well as for the full costs and disbursement of these proceedings, and all general and equitable relief as the court may deem appropriate herein.

Respectfully submitted,

GAINSBURGH, BENJAMIN, DAVID MEUNIER, NORIEA AND WAR SHAUER

BY: /s/ Jeffrey A. Mitchell
NICK F. NORIEA, JR.,, #10036
JEFFREY A. MITCHELL, #19711
2800 Energy Centre
1100 Poydras Street
New Orleans, LA 70163
Telephone: (504) 522-2304

PLEASE SERVE:

Waterman Steamship Corporation
through its agent for the service of process
George Denegre
201 St. Charles Avenue
50th Floor
New Orleans, LA 70170

Supreme Court, U.S.
FILED
JUN 13 2000
CLERK

(3)

NO. 99-1746

IN THE

SUPREME COURT OF THE UNITED STATES

WATERMAN STEAMSHIP CORPORATION

PETITIONER

VERSUS

HERBERT ANDERSON

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KURT P. FORSHAG
Counsel of Record
MARK N. CARACCI,
MARTINY & CARACCI
131 Airline Drive, Suite 201
Post Office Box 8828
Metairie, Louisiana 70011
Telephone: (504) 834-7676

ATTORNEYS FOR RESPONDENT HERBERT ANDERSON

3 pp

QUESTIONS PRESENTED FOR REVIEW

I. THE RULINGS OF THE LOUISIANA STATE COURTS WHICH PETITIONER HAS PRESENTED TO THIS COURT DO NOT QUALIFY AS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257 (a). THUS, PETITIONER'S WRIT APPLICATION SHOULD BE DISMISSED FOR WANT OF A FINAL JUDGMENT.

II. WHETHER OR NOT THE LOUISIANA STATE COURTS WERE CORRECT IN UPHOLDING RESPONDENT'S ARGUMENT THAT: "THE TEST USED BY THE COURTS AND MORE PARTICULARLY THE FEDERAL FIFTH CIRCUIT, IN DETERMINING WHETHER OR NOT THE EXCLUSIVITY PROVISIONS OF THE SUITS IN ADMIRALTY ACT APPLY, IS "OPERATIONAL CONTROL". THAT IS WHO WAS IN CHARGE OF THE DAY TO DAY OPERATIONS OF THE VESSEL WHERE THE RESPONDENT WAS INJURED. THIS TEST IS USED REGARDLESS OF WHETHER OR NOT THE INJURED SEAMAN IS MAKING JONES ACT NEGLIGENCE CLAIMS, OR THOSE AS WELL AS TRADITIONAL ADMIRALTY CLAIMS, SUCH AS UNSEAWORTHINESS AND CLAIMS FOR MAINTENANCE AND CURE.

III. WHETHER OR NOT THE LOUISIANA SUPREME COURT WAS CORRECT IN DENYING WRITS, AND THE FOURTH CIRCUIT COURT OF APPEAL WAS CORRECT IN DENYING PETITIONER'S APPLICATION FOR SUPERVISORY WRITS AND FINDING THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER WATERMAN STEAMSHIP CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT AND LAW WHICH PRECLUDE SUMMARY JUDGMENT IN THIS MATTER.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 1

ARGUMENTS 3

I. THE RULINGS OF THE LOUISIANA STATE COURTS WHICH PETITIONER HAS PRESENTED TO THIS COURT DO NOT QUALIFY AS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257(a). THUS, PETITIONER'S WRIT APPLICATION SHOULD BE DISMISSED FOR WANT OF A FINAL JUDGMENT 3

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CONCLUSION 30

APPENDIX:

1. February 18, 2000 Louisiana Supreme Court decision ... App. 1

2. December 17, 1999 ruling by the Louisiana Court of Appeal for the Fourth Circuit ..... App. 2

3. Judgment of the Trial Court for the Civil District Court for the Parish of Orleans, dated September 24, 1999 ..... App. 4

4. Reasons for Judgment of the Trial Court for the Civil District Court for the Parish of Orleans, dated October 7, 1999. ... App. 6

5. Petition for Damages . . . . . App. 26

6. Exception and Answer . . . . . App. 32

7. 28 U.S.C.A. § 1257 (West 1993) . . . . . App. 38

8. 46 U.S.C.A. § 741 (West Supp. 1999) . . . . . App. 38

9. 46 U.S.C.A. § 742 (West Supp. 1999) . . . . . App. 39

10. 46 U.S.C.A. § 745 (West 1975) . . . . . App. 40

11. *Louisiana Code of Civil Procedure* art. 966
(West Supp. 2000) . . . . . App. 41

12. *Louisiana Code of Civil Procedure* art. 968
(West 1984) . . . . . App. 43

13. 28 U.S.C.A. § 1333 (West 1993) . . . . . App. 43

14. 46 U.S.C.A. § 688 (West Supp. 1999) . . . . . App. 44

TABLE OF AUTHORITIES

CASES **PAGE**

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). 4

Daniels v. Florida Power and Light Company, 317 F.2d 41 (5th Cir. 1963), *cert. denied,* 375 U.S. 832, 84 S.Ct.78, 11 L.Ed.2d 63 (1963). 7

Davis v. Bd. Of Supervisors of La. State University et al, 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied,* 98-C-1329 (La.6/26/98), 719 So.2d 1288 29

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Degruy v. Degruy, 98-1416, 98-1811 (La. App. 4th Cir. 1/27/99), 728 So. 2d 914 4

Favorite v. Marine Personnel and Provisioning, Inc., 955 F.2d 382 (5th Cir. 1992) 13, 14

Godeaux v. Dynamic Industries, Inc., 864 F. Supp. 614 (E.D. Tex. 1994) 7

Holmes v. Daybrook Fisheries, Inc., 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, *writ denied* 99-C-1571 (La. 9/24/99) ___So.2d___.....8

Jefferson v. City of Tarrant, Alabama, ____U.S.____, 118 S.Ct. 481, ____L.Ed.2d.____(1997) 4

Morales-Melendez v. Steamship Mut., 763 F. Supp. 1174 (D. Puerto Rico 1991). 21-24

Nelson v. Research Corp. Of University of Hawaii, 805 F. Supp. 837, (D. Hawaii 1992) 20, 21

Servis v. Hiller Systems Inc., 54 F.3d 203 (4th Cir. 1995), *cert. den.,* 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996). 20

Trautman v. Buck Steber, Inc., 693 F.2d 440 (5th Cir. 1982). . . 16-20

Vendetto v. Sonat Offshore Drilling Co., 97-3103 (La. 1/20/99), 725 So.2d 474, *rehearing denied,* 97-3103 (La. 2/12/99),_____ So.2d____, *cert. denied,*_____U.S.____,119 S.Ct. 2369, 2370, 144 L.Ed. 2d 773 (1999) 8

Williams v. Central Gulf Lines, 874 F.2d 1058 (5th Cir. 1989), *cert denied,* 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990) 8-13

STATUTES

28 U.S.C.A. § 1333 (West 1993). 2

46 U.S.C.A. § 688 (West Supp. 1999). 2

28 U.S.C.A. § 1257 (West 1993). 3, 4

46 U.S.C.A. § 741 (West Supp. 1999). 6

46 U.S.C.A. § 742 (West Supp. 1999) 7-19

46 U.S.C.A. § 745 (West 1975) 9

Louisiana Code of Civil Procedure art. 966 (West Supp. 2000) . . . 3

Louisiana Code of Civil Procedure art. 968 (West 1984). 3

DECISIONS BELOW

The decisions of the Trial Court, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court, not yet reported, appear in the Appendix.

JURISDICTIONAL STATEMENT

The rulings of the Louisiana State Courts which Petitioner has presented to this Court, do not qualify as a final judgment within the meaning of 28 U.S.C. §1257(a). Thus, Petitioner's writ application should be dismissed for want of a final judgment.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The statutory provisions involved in this case are cited here as follows, and the full text of the cited provisions are set out in the Appendix.

28 U.S.C.A. § 1333 (West 1993).
46 U.S.C.A. § 688 (West Supp. 1999).
28 U.S.C.A. § 1257 (West 1993).
46 U.S.C.A. § 741 (West Supp. 1999).
46 U.S.C.A. § 745 (West 1975).
Louisiana Code of Civil Procedure art. 966 (West Supp. 2000).
Louisiana Code of Civil Procedure art. 968 (West 1984).

STATEMENT OF THE CASE

On May 1, 1996, Plaintiff-Respondent, Herbert Anderson, (hereinafter referred to as "Respondent"), was employed by Defendant-Petitioner Waterman Steamship Corporation, (hereinafter referred to as "Petitioner"), as a Seaman and Assistant Cook Utility of the crew. Respondent was permanently assigned to a vessel in navigation which was being operated by his employer, Petitioner Waterman Steamship Corporation. The vessel was named the S.S. MAJOR STEPHEN W. PLESS.

On May 1st, 1996, Respondent was engaged in the course and scope of his employment aboard the S.S. MAJOR STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

Respondent alleges that on that date, an employee or employees of Waterman Steamship Corporation who was working on the boat on or about May 1, 1996, carelessly left an object or objects on the floor of the meat box of the galley, on the S.S. MAJOR STEPHEN W. PLESS, which caused Respondent Herbert Anderson to trip, slip, or otherwise fall over the object or objects on the floor and into a rack or shelf in the galley. Respondent sustained injuries as a result of this accident. Respondent does not know the name of the person or persons who left the object or objects on the floor, but believes they were employees of Waterman.

On April 30, 1997, Respondent filed suit against his employer Waterman Steamship Corporation. (Appendix 5). In his Petition for Damages, Respondent is making not only a Jones Act negligence claim, (46 U.S.C. § 688), but also claims for unseaworthiness and maintenance and cure. The jurisdiction of the State Court is premised on the "savings to suitors" clause. (28 U.S.C. § 1333).

Petitioner filed two exceptions and a Motion for Summary Judgment in the trial court. After both parties filed several memorandums, and exhibits, a hearing was held on the Motion for Summary Judgment on September 3, 1999. At that time the Trial Judge issued an oral ruling denying the Motion for Summary Judgment, and overruling the two exceptions. The Honorable Trial Court Judge instructed undersigned counsel to prepare a written Judgment and written Reasons for Judgment. On September 24, 1999, the Judgment denying the Motion for Summary Judgment was signed. Notice of Signing of Judgment was issued on October 15, 1999. (Appendix 3). On October 7, 1999, the Reasons for Judgment were signed. Notice of Signing of Judgment for the Reasons for Judgment was issued on October 8, 1999. (Appendix 4).

On November 10, 1999, Petitioner filed an Application for Supervisory Writs with the Fourth Circuit Court of Appeal seeking a review of the Trial Court's ruling denying Waterman Steamship Corporation's Motion for Summary Judgment. Respondent Herbert Anderson, filed a Response to the Application for Supervisory Writs on November 29, 1999. On December 17, 1999, the Fourth Circuit issued a two page decision denying the application for Supervisory Writs. (Appendix 2).

On December 28, 1999, Petitioner filed an Application for Supervisory Writs with the Louisiana Supreme Court seeking a review of the Fourth Circuit Court of Appeals denial of their Application for Supervisory Writs. On February 18, 2000, the Louisiana Supreme Court denied Petitioner's Writ Application. (Appendix 1).

Respondent Herbert Anderson, now files this response arguing that the Trial Court's ruling denying the Motion for Summary Judgment, which was affirmed by the Fourth Circuit, and the Louisiana Supreme Court's denial of Petitioner's Application for Supervisory Writs, was correct, and should be upheld.

ARGUMENTS

I. THE RULINGS OF THE LOUISIANA STATE COURTS WHICH PETITIONER HAS PRESENTED TO THIS COURT, DO NOT QUALIFY AS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257 (a). THUS, PETITIONER'S WRIT APPLICATION SHOULD BE DISMISSED FOR WANT OF A FINAL JUDGMENT.

Respondent raises as an initial issue, that this Court lacks jurisdiction to review the interlocutory rulings of the Louisiana State courts. *Louisiana Code of Civil Procedure* art. 966 (West Supp. 2000); *Louisiana Code of Civil Procedure* art. 968 (West 1984). "[T]he denial of a motion for summary judgment is an interlocutory judgment and is not appealable." *Davis v. Speciality Diving, Inc.*, 98-0458, 98-0459 (La. App. 1st Cir. 4/1/99), 740 So.2d 666, 669; 98-0458, 98-0459 at p. 5, *writ denied*, 99-1852 (La.

10/8/99); ____So.2d____ (citations omitted). *Degruy v. Degruy,* 98-1416, 98-1811 (La. App. 4th Cir. 1/27/99), 728 So. 2d 914, 917-918; 98-1416, 98-1811 at pp. 5-6.

This is because the state courts have not yet issued a final judgment in this matter. The state courts decisions are not final because there are further proceedings to be had in the state trial court; an entire trial on the merits. It is significant that there will be other issues of federal maritime law considered by the trial court in this maritime personal injury case. Thus, the rulings of the Louisiana state courts which Petitioner has presented to this court do not qualify as a final judgment within the meaning of 28 U.S.C. § 1257 (a). *Jefferson v. City of Tarrant, Alabama,* ___U.S.___, 118 S.Ct. 481, ____L.Ed.2d.____(1997). *Adams v. Robertson,* 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). It is respectfully submitted that Petitioner's writ application should be dismissed for want of a final Judgment.

II. THE LOUISIANA STATE COURTS WERE CORRECT IN UPHOLDING RESPONDENT'S ARGUMENT THAT: "THE TEST USED BY THE COURTS AND MORE PARTICULARLY THE FEDERAL FIFTH CIRCUIT, IN DETERMINING WHETHER OR NOT THE EXCLUSIVITY PROVISIONS OF THE SUITS IN ADMIRALTY ACT APPLY, IS "OPERATIONAL CONTROL". THAT IS WHO WAS IN CHARGE OF THE DAY TO DAY OPERATIONS OF THE VESSEL WHERE THE RESPONDENT WAS INJURED. THIS TEST IS USED REGARDLESS OF WHETHER OR NOT THE INJURED SEAMAN IS MAKING JONES ACT NEGLIGENCE CLAIMS, OR THOSE AS WELL AS TRADITIONAL ADMIRALTY CLAIMS, SUCH AS UNSEAWORTHINESS AND CLAIMS FOR MAINTENANCE AND CURE.

Petitioner Waterman filed the Motion for Summary Judgment in the Trial Court contending that "[t]here are no genuine issues as to any material facts, and Waterman is entitled to judgment as a matter of law because liability for plaintiff's accident

rests exclusively with the United States Government pursuant to the Suits in Admiralty Act. Waterman hereby formally amends its Exception of No Right of Action or No Cause of Action by moving for alternative relief of summary judgment." (Petitioner's Reply Memorandum, p.1). However, Respondent argued and the Trial Court agreed that there are numerous disputed issues of material fact and law which preclude summary judgment in this matter. In Petitioner's Motion for Summary Judgment, Waterman appeared to be arguing that since Respondent is making not only a Jones Act negligence claim, but also claims for unseaworthiness and maintenance and cure, that a different standard applies to determine whether or not the exclusivity provisions of the Suits in Admiralty Act apply. Petitioner further contended that "[c]laims for unseaworthiness and maintenance and cure, on the other hand, trigger potential *in rem* liability on the part of the vessel upon which the injury occurred...." (Petitioner's Reply Memorandum p., 2; citation omitted).

Petitioner then stated in their trial court Reply Memorandum, the following:

> At a later section of this brief, Waterman analyzes the degree of control that the United States exercised over the S/S MAJ. STEPHEN W. PLESS and shows that the degree of control was sufficient to render the United States, as charterer, liable for the alleged negligence of the crew of the S/S MAJ. STEPHEN W. PLESS. At this section of the brief, however, Waterman shows that the exclusivity of liability provisions of the Suits in Admiralty Act have been triggered by the plaintiff asserting claims that give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS.
>
> (Petitioner's Reply Memorandum p., 2).

In his June 23rd Trial Court Memorandum, Respondent addressed in extensive detail the fact that the operational control of

the S.S. MAJOR STEPHEN W. PLESS, was at all times with Waterman Steamship Corporation, not the United States, who is a time charterer. Respondent will review those details later in this brief, but at this point will address Petitioner's *"in rem"* arguments.

One thing that is apparent from the face of Respondent's pleadings is that the S.S. MAJOR STEPHEN W. PLESS, has not been sued in this matter. The only Defendant is Waterman Steamship Corporation, Respondent's employer and the operator of the S.S. MAJOR STEPHEN W. PLESS. (Appendix 5).

Respondent cited section 741 of the Suits in Admiralty Act, 46 U.S.C. § 741, in support of their contention that "[c]laims arising on vessels operated for the United States are subject to the Suits in Admiralty Act." (Petitioner's Reply Memorandum p. 2).

Section 741 of the Suits in Admiralty Act provides in pertinent part as follows:

> **§ 741. Exemption of United States vessels and cargoes from arrest or seizure**
>
> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall after March 9, 1920, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions:....
>
> 46 U.S.C.A. § 741 (West Supp. 1999).

It is significant to note that the test used by the Courts and more particularly the Federal Fifth Circuit is "operational control".

That is who was in charge of the day to day operations of the vessel where the plaintiff was injured.

In the present case Respondent has asserted three causes of action against his employer and the operator of the S.S. MAJOR STEPHEN W. PLESS, Petitioner Waterman. [1]

The "operational control" test is used regardless of whether or not the injured seaman is making Jones Act negligence

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[1] As was discussed in more detail in Respondent's June 23rd Memorandum, Petitioner Waterman Steamship Corporation is not the actual owner of the S.S. MAJOR STEPHEN W. PLESS, rather Waterman is the operator of the boat pursuant to an Operating Contract, which will be discussed further in the next section. However, the law is clear that an owner or an operator can be held liable for unseaworthiness. In *Daniels v. Florida Power and Light Company,* 317 F.2d 41 (5th Cir. 1963), *cert. denied,* 375 U.S. 832, 84 S.Ct.78, 11 L.Ed.2d 63 (1963), the United States Fifth Circuit Court of Appeal stated that:

> The idea of seaworthiness and the doctrine of implied warranty of seaworthiness arises out of the vessel, and the critical consideration in applying the doctrine is that the person sought to be held legally liable must be in the relationship of an owner or operator of a vessel....
>
> *Id.* at 43. *See Also: Godeaux v. Dynamic Industries, Inc.,* 864 F. Supp. 614 (E.D. Tex. 1994), ("Only owners and operators may be liable for unseaworthiness of a vessel." *Id.* at 622, (citations omitted.))

claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. [2]

The United States Fifth Circuit Court of Appeal discussed the very issue raised in Petitioner's Motion for Summary Judgment in *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989), *cert denied,* 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990). [3] In *Williams, supra,* Ballard Williams, a seaman who was employed by Central Gulf Lines, aboard its vessel the S/S Bay, became ill while on board, and after being transferred to a hospital, subsequently died. The representative of his estate, Williams, filed suit against Central Gulf pursuant to the general maritime law and the Jones Act, 46 U.S.C. § 688, alleging various acts of negligence. *Id.* at 1059.

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[2] In *Holmes v. Daybrook Fisheries, Inc.,* 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, *writ denied,* 99-C-1571 (La. 9/24/99) ____So.2d____, the Fourth Circuit stated that:

> Admiralty claims may be brought in federal court pursuant to its admiralty jurisdiction or in state court under the savings to suitors clause; in either case, federal substantive maritime law applies....

Id. at 98-1824, at pp. 2-3; 730 So.2d at 1008, (citation omitted).

[3] The Louisiana Supreme Court in *Vendetto v. Sonat Offshore Drilling Co.,* 97-3103 (La. 1/20/99), 725 So.2d 474, *rehearing denied,* 97-3103 (La. 2/12/99), ____So.2d____, *cert. denied,* ____U.S.____, 119 S.Ct. 2369, 2370, 144 L.Ed. 2d 773 (1999), when discussing a recent maritime federal Fifth Circuit case, noted that they were "not bound by the Fifth Circuit's decision...." *Id.* at 97-3103, at p. 9; 725 So.2d at 478-479. However, it is respectfully submitted that while technically the state court may not be bound by federal Fifth Circuit law, that the Fifth Circuit's reasoning is certainly persuasive authority for the Louisiana state courts.

The Fifth Circuit described the procedural events leading up to the appeal as follows:

> During discovery it was revealed that, at the time of Ballard's death, the S/S Bay was under a time charter to the United States for use by the Military Sealift Command, an agency of the Department of the Navy. Central Gulf moved for summary judgment or, alternatively, to dismiss on the grounds that, pursuant to the Suits in Admiralty Act's exclusivity provision, the plaintiff's sole remedy was a claim against the United States. The district court agreed with Central Gulf's interpretation of the Suits in Admiralty Act and because the United States had not been named as a party-defendant, dismissed the suit. The appellant since filed a timely notice of appeal.

Id. at 1059.

The Suits in Admiralty Act as discussed by the Court in *Williams, supra,* in pertinent part provides as follows:

> **§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims**
>
> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim:...

46 U.S.C.A. § 745 (West 1975).

In *Williams, supra,* the Defendant Central Gulf argued on appeal that since the Public Vessels Act or alternatively, the Suits in Admiralty Act provided a remedy for Plaintiff against the United States, that Section 745, thus operated as a bar to Plaintiff's claim against Central Gulf. *Id.* 874 F.2d at 1060. The Fifth Circuit however after carefully examining legislative history, as well as the relevant case law, concluded that neither the Suits in Admiralty Act nor the Public Vessels Act provided a remedy to Plaintiff against the United States under the facts present in *Williams,* and thus, "that the exclusivity provision, therefore, does not bar suit against Central Gulf." *Id.*

The Court in *Williams,* next extensively discussed the Suits in Admiralty Act. In *Williams, supra,* the Court discussed this issue as follows:

> **IV. THE SUITS IN ADMIRALTY ACT**
>
> The exclusivity provision may bar the appellant's suit against Central Gulf "where a remedy {against the United States} is provided by {the Suits in Admiralty Act}." 46 U.S.C. App. § 745. As mentioned above, this court recognized that the provisions of the Suits in Admiralty Act do not themselves *provide* a remedy. Rather, the Act merely acts to waive the United States immunity so as to furnish a "jurisdictional hook on which to hang a traditional admiralty claim." *Trautman,* 693 F.2d at 444. In light of *Trautman,* we view the issue of whether a remedy against the United States *is provided* by the Suits in Admiralty Act as entailing a two part inquiry. First, we must ask whether the United States has consented to suit given the facts at hand. This is the "jurisdictional hook" inquiry and involves applying the Act's statutory language to the present circumstances. If a jurisdictional hook is found to exist, we must then ask whether the party attempting to invoke the

exclusivity provision as a defense to suit has shown that "a traditional admiralty claim" could have been stated against the United States. Only by satisfying this two part test can it be concluded that "a remedy is provided by {the Suits in Admiralty Act}" so as to justify barring plaintiffs from bringing suit against private entities such as Central Gulf.

A. The "Jurisdictional Hook" Inquiry

As discussed, Central Gulf owned the S/S Bay, the vessel on which Ballard became ill. Pursuant to a written agreement, Central Gulf time chartered the vessel to the United States but retained possession and control of the vessel's day-to-day operations. *See supra* Articles 31 and 22(a) of the charter agreement. The United States controlled the cargoes carried and ports of call and destination to which the vessel sailed.

Based on these relationships, Central Gulf argues that the Suits in Admiralty Act functions to waive the United States' sovereign immunity thus establishing a jurisdictional hook. We agree....

****

In view of the 1960 amendment, if a proceeding in admiralty could be asserted against a private person in the Government's position, then the Suits in Admiralty Act will provide a jurisdictional hook on which to hang a claim against the Government. Had a private person time chartered the S/S Bay, we are persuaded that, based on notions of operational control, such persons could be subject to suit for the negligence alleged herein. Thus, by operation of the 1960 amendment to the

Suits in Admiralty Act, the Government, under the present circumstances, has consented to suit as if a private person were involved.

B. The "Traditional Admiralty Claim" Inquiry

The Suits in Admiralty Act will not "provide a remedy" as envisioned by section 745's exclusivity provision unless, when the action arose, principles of maritime law would have allowed the appellant to state a claim against a private person in the same position as the Government, i.e. against a private time charterer. This Circuit's general rule is that a time charterer " 'who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.' " *P&E Boat Rentals, Inc. v. Ennia General Insurance Co., Inc.*, 872 F.2d 642, 647 (5th Cir. 1989) (quoting *Mallard v. Aluminum Co. of Canada, Inc.*, 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981). *See also* M.J. Norris, *The Law of Maritime Personal Injuries 3d*, § 130 (1987). The term "control" as used by this court in formulating this general rule refers to operational control of the vessel, not ultimate control of its destination or cargos.

Article 22(a) of the present charter agreement patently states that '[t]he Master of the Vessel...shall not be under the direction of the Charterer as regards navigation, care and custody of the Vessel and care of the cargo." We find that, by operation of this provision, the United States acquired no operational control over the vessel. Although the charter provides that the United States shall bear certain costs, responsibility for

costs "in and of itself does not transfer operational responsibility from the owner." *Mallard,* 634 F.2d at 242 n. 5. Indeed, "this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect." *Id.* The charter contains no clear language whereby the United States assumes responsibility for the vessel's operations or for the personal injuries caused by the negligence of the crew. We therefore hold that operational control did not shift from Central Gulf to the United States and that, given the specific facts at hand, the appellant would have been unable to state a claim against the United States as time charterer.

V. CONCLUSION

Application of our two part inquiry indicates that the second prong, i.e. the existence of a traditional admiralty claim prong, has not been met. Because a jurisdictional hook alone does not suffice to "provide a remedy" under the Suits in Admiralty Act, section 745's exclusivity provision does not operate to bar suit against Central Gulf. We therefore, VACATE the dismissal of the appellant's claims and REMAND for proceedings not inconsistent with this opinion.

Id. at 1061-1063. (Emphasis added).

In *Favorite v. Marine Personnel and Provisioning, Inc.,* 955 F.2d 382 (5th Cir. 1992), the Fifth Circuit also used "the concept of operational control", to determine whether or not the United States was the proper party defendant. In *Favorite supra,* the claims which were asserted by the Plaintiff were as follows:

In his complaint, Favorite alleges that during his employ by Management as a seaman aboard the USNS SEALIFT CARIBBEAN, on or

about January 16, 1988, he was injured as a result of the negligence of Management and the unseaworthiness of the vessel. Favorite filed suit against Personnel, individually and as agent for Management, under the Jones Act, 46 U.S.C. App. § 688, and the general maritime law. Favorite later amended his complaint to add Leasing and the United States as defendants.

Id. at 384, (emphasis added).

Thus, the Fifth Circuit when discussing "the concept of operational control" had before it in both *Williams,* and *Favorite,* not only Jones Act negligence claims, but also general maritime law claims.

In the Reasons for Judgment in the present case, the Honorable Trial Court Judge stated as follows:

> The Court finds the reasoning in *Williams, supra,* to be persuasive and adopts the "operational control" test in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further adopts Plaintiff's argument that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. *See Also: Favorite v. Marine Personnel and Provisioning, Inc.,* 955 F.2d 382, 384-385, 388 (5th Cir. 1992); *Trautman v. Buck Steber, Inc.,* 693 F.2d 440, 441-444 (5th Cir. 1982); *Servis v. Hiller Systems Inc.,* 54 F.3d 203, 208 (4th Cir. 1995), *cert. den.,* 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996); *Morales-Melendez v. Steamship Mut.,* 763 F. Supp.

1174, 1175-1176, 1179-1180 (D. Puerto Rico 1991); *Nakano v. United States of America and Vessel Charters, Inc.*, 1988 AMC 2220, (U.S.D.C. So. Dist. Cal. 1988); *Nelson v. Research Corp. Of University of Hawaii,* 805 F. Supp. 837, 846-848 (D. Hawaii 1992).

The Court further finds that several of the cases cited by Defendant Waterman: *Pineiro v. United States,* 65 F. Supp. 191 (Dist. Ct., N.D. Cal.,S.D. 1945); *Burkholder v. United States,* 60 F. Supp. 700 (Dist Ct., E.D. Penn. 1945) (On Reargument); *Epstein v. United States,* 86 F. Supp. 740 (U.S.D.C., S.D. N.Y. 1949); and *Western Tankers Corporation v. United States,* 1975 AMC 775 (U.S.D.C., S.D. N.Y. 1975), appear to use an "operated by or for" test to determine whether or not the exclusivity provisions of the Suits in Admiralty Act applies.

The Court however, as stated earlier, agrees with Plaintiff that the more modern "operational control" test should be used in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured.

(Reasons for Judgment, dated October 7, 1999, Appendix 4, at pp. App. 17-18). [4]

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[4] The Trial Court Judge held that her reasoning was applicable to her ruling on the no cause of action and no right of action exceptions, which were before her, (but are not a part of this writ application,) as well as her ruling on Waterman's Motion for Summary Judgment.

In an earlier case, the Federal Fifth Circuit specifically discussed not only whether or not the government was liable for Jones Act negligence, but also whether or not they were liable for the unseaworthiness of a vessel which the Plaintiff contended was "operated by or for the United States", within the meaning of the Suits in Admiralty Act. In *Trautman v. Buck Steber, Inc.,* 693 F.2d 440 (5th Cir. 1982), the Court described the Plaintiff's claims and the procedural history of the case as follows:

> Appellant Richard Wayne Trautman, a salvage diver employed by a private corporation, was injured while working in the 1974 clearing of the Suez Canal, an operation coordinated by the governments of Egypt and the United States. Appellant brought an action against the United States for these injuries based upon the Suits in Admiralty Act, 46 U.S.C. §§ 741, et seq. and the Public Vessels Act, 46 U.S.C. §§ 781 et seq.
>
> Appellant appeals from the adverse decision of the district court, sitting without a jury and acting within its admiralty jurisdiction, which found that the United States was not liable for appellant's injuries. More specifically, the district court found that (1) the diving barge to which appellant was assigned was not "operated by or for" the United States within the meaning of the Suits in Admiralty Act, 46 U.S.C. § 741, and "accordingly the United States owed no warranty of seaworthiness" to appellant; (2) the United States exercised no operational control over appellant's work and was not responsible for the unsafe diving practices which "resulted in or contributed to" appellant's injury; and (3) the United States, through the Navy doctor assigned to the project and who examined the appellant, was not guilty of maritime medical malpractice. After careful consideration of this case, we affirm the decision of the lower court.

Id. at 441-442, (footnote citation omitted, emphasis added).

Thus, the Court used the operational control test to determine whether or not the United States was liable for an unseaworthiness claim, by an injured plaintiff.

In *Trautman, supra,* the Fifth Circuit explained their reasoning for affirming the lower court's ruling as follows:

> In his first assignment of error, appellant asserts that the trial court erred in concluding that the dive barge was not a vessel "operated by or for the United States" within the meaning of the Suits in Admiralty Act, 46 U.S.C. § 741, and, for that reason, the United States was not liable for the unseaworthiness of the barge or for the negligence of appellant's employer.
>
> In analyzing appellant's contentions, it should be noted that the Suits in Admiralty Act does not itself provide a cause of action against the United States. Instead, it only acts as a waiver of the sovereign immunity of the United States in admiralty suits. *Nelson v. United States,* 639 F.2d 469 (9th Cir. 1980). Thus, the act merely provides a jurisdictional hook upon which to hang a traditional admiralty claim.
>
> The scope of the jurisdiction provided by the Suits in Admiralty Act is somewhat confusing. Prior to 1960, jurisdiction under the Act depended on whether the vessel involved was "...owned by... or in the possession of... or operated by or for the United States...." 46 U.S.C. § 741. *See De Bardeleben Marine Corp. v. United States,* 451 F.2d 140 (5th Cir. 1971).
>
> The 1960 amendment to 46 U.S.C. § 742, as discussed below, did much to undercut the

importance of this determination. However, it appears that a finding that the vessel in question was owned by, possessed by, or operated by or for the United States is still relevant to the question of whether the United States owed a duty of seaworthiness to the injured party. *See Reed v. The Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1962).

There has been little judicial interpretation of the relevant language of 46 U.S.C. § 741. *See Calmar Steamship Corp. v. United States,* 345 U.S. 446, 73 S.Ct. 733, 97 L.Ed. 1140 (1953); *Matson Navigation Co. v. United States,* 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932); *A.H. Bull S.S. Co. v. United States,* 105 F. Supp. 474 *(S.D.N.Y. 1952); Epstein v. United States,* 86 F. Supp. 740 (S.D.N.Y. 1949); *N.S. Byonnes & Son Dampskibsrederi Aktieselskab v. United States,* 298 F. 123 (S.D.N.Y. 1923). In the above cited cases, it appears that control by the United States is the crucial element in determining whether a case falls within the jurisdiction provided by § 741. This focus on control is stated more explicitly in *J.W. Petersen Coal & Oil Co. v. United States,* 323 F. Supp. 1198, 1205-06 (N.D. Ill. 1970).

> [I]t would seem to the court that extensive operation or direction of the vessel by government personnel would be required to make the vessel operated "by the United States" and something closer to a time charter where the Government directs the vessel's overall functions even though the owner may control the operation of the vessel's personnel and

> equipment rather than a single purpose contract entered into with an independent contractor would be required to make the vessel "operated for the United States."

Id. at 443-444, (footnote citation omitted, emphasis added).

Thus, it is clear that regardless of whether it is general maritime claims, or Jones Act negligence claims, that the same standard applies. For the purposes of Petitioner's motion for summary judgment, it is significant that the Court in *Trautman, supra,* further indicated that the question of whether or not the Government exercised sufficient operational control of the vessel, to be held liable for an injured Plaintiff's injuries, is a question of fact.

In *Trautman, supra,* the Fifth Circuit explained this as follows:

> We must now turn to appellant's substantive arguments relating to whether Steber was an agent of the United States and/or whether the United States was in sufficient operational control of Steber's activities in order to cause the United States to be liable under the Jones Act, 46 U.S.C.§ 688, for the negligence of Steber which caused or contributed to appellant's injuries. Appellant contends that the combination of Boyd's visits to the barge, the contract change for the work on the Mecca, and the designation of the civilian members of the operation as part of the "Force" in the Egyptian/United States agreement is sufficient to demonstrate that Steber was an agent of the United States and/or under its operational control. Although appellant couches this argument in terms of an improper determination of the legal standards to be applied, we believe that the question is really one of fact to which our review is limited to the

clearly erroneous standard as announced in McAllister, supra.

Id. at 445, (emphasis added). [5]

In *Servis v. Hiller Systems Inc.*, 54 F.3d 203 (4th Cir. 1995), *cert. den.*, 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996), the federal Fourth Circuit Court of Appeal stated that:

> For purposes of the SAA, a primary factor in determining agency status is the degree of operational control exercised by the United States. See, *e.g. Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 445 (5th Cir. 1982) (reasoning that degree of United States' operational control determines agency status under the Jones Act); *Nelson*, 805 F. Supp. at 847....

Id. at 208. (Emphasis added). [6]

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[5] Buck Steber, Inc., (Steber), hired Appellant Trautman as one of the divers to carry out its part of a subcontract involving diving services necessary for the removal of sunken vessels in the Suez Canal. *Id.* at 442.

[6] *See Also: Nelson v. Research Corp. Of University of Hawaii*, 805 F. Supp. 837 (D. Hawaii 1992). Plaintiff, captain of a research vessel, brought an action under the Jones Act and general maritime law to recover for his injuries. *Id.* at 840-841. The Court used the operational control test to determine that Research Corporation of the University of Hawaii (RCUH), who was Plaintiff's employer, was not an agent of the United States who was the owner of the boat. There was a bareboat charter agreement between RCUH and the United States Navy. The Court held that: "Looking at both the agreement and the venture as a whole, RCUH was not an agent of the United States. Accordingly, the SIAA is not a bar to Nelson's claim against RCUH." *Id.* at 846-848.

Another case, where operational control was the determining factor as to whether or not the United States was liable under the Suits in Admiralty Act for negligence or unseaworthiness, is *Morales-Melendez v. Steamship Mut.*, 763 F. Supp. 1174 (D. Puerto Rico 1991). In Morales-Melendez, the United District Court for the District of Puerto Rico, summarized the factual background of this litigation as follows:

> This tort action, brought both under diversity jurisdiction and the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-745 (*see* complaint, ¶ 3,4,19) is now before us for resolution of several pending motions. The relevant undisputed facts, as obtained from the myriad of documents on file, are as follows: Plaintiffs Carmelo Morales-Melendez and Alicia Rivera-de-Morales are residents of the town of Yabucoa, Puerto Rico. At the time in which the incidents alleged in the complaint took place, plaintiff Carmelo Morales-Melendez was working as a marine cargo inspector of petroleum products for E.W. Saybolt and Co. (Saybolt). This company, in turn, was contracted by Puerto Rico Sun Oil Co. (Sun Oil) to provide inspection services in relation to petroleum products which were going to be delivered to the M/V PAUL BUCK, a tanker vessel. At that time, the vessel was under a time-charter to defendant United States of America through the Military Sealift Command, an agency of the Department of the Navy; although it was being operated by Ocean Ships, Inc. (Ocean Ships) under the terms of an operating contract entered into with Ocean Freedom Shipping, Inc. (Ocean Freedom), its demise charterer. It is not disputed that Ocean Ships maintained complete control of the manning, provisioning, equipment maintenance and marine operation of the M/V PAUL

> BUCK. The remaining defendant, Steamship Mutual (Steamship), is the vessel's protection and indemnity underwriter.
>
> On March 5, 1988, the M/V PAUL BUCK arrived at Yabucoa, Puerto Rico, and shortly thereafter it was boarded by Mr. Morales-Melendez in order to conduct the inspection of its equipment as required by the contract between Saybolt and Sun Oil. While working on board the M/V PAUL BUCK, Mr. Morales-Melendez suffered a fall, as a result of which he sustained personal injuries....
>
> ****
>
> Mr. Morales-Melendez apparently having concluded all the administrative proceedings required by the Puerto Rico Workmen's Accident Compensation Act (PRWACA), 11 L.P.R.A. §§ 1-42, he then filed this action seeking damages for the injuries allegedly suffered....

Id. at 1175-1176, (footnote citation omitted).

Plaintiffs sued several Defendants and added the United States as a Defendant, by amended complaint. The United States "....filed a motion requesting dismissal or summary judgment in their favor...." Id. at p. 1176. The District Court in *Morales-Melendez, supra,* discussed the United States motion and the reasons for granting it, finding that the Plaintiffs could not state a claim against the government under the Suits In Admiralty Act (SIAA), as follows:

> *The United States' Motion to Dismiss and/or for Summary Judgment*
>
> We now proceed to entertain the arguments raised by the government in its motion to

dismiss and/or for summary judgment. As we previously noted, the government was not an original party to this suit, but was later added by plaintiffs apparently based on a claim made by the original defendants which insisted that, pursuant to the Suits in Admiralty Act, (SIAA) the exclusive remedy in this action lay only against the sovereign. *See* 46 U.S.C. App. § 745. The government has taken an exception to that assessment, however, claiming instead that under the specific facts of this case the SIAA fails to provide a remedy as the exclusivity provision of the statute does not apply.

We agree with the government, as the language of the statute is patently clear in allowing proceedings against the United States only in those circumstances where, if a vessel were privately owned or operated, a proceeding in admiralty could be maintained against the private party. *See* 46 U.S.C. App. § 742. In this case, the undisputed evidence on record shows that the United States was merely acting as a time charterer without operational control of the PAUL BUCK when the accident which originated this litigation took place. *See* Time Charter Party between Ocean Freedom Shipping, Inc. and The United States of America, Art. 35, Art. 22 (a). As the general rule on a time charterer's liability is that it assumes no liability flowing from the unseaworthiness of the vessel or the negligence of the crew unless it is shown that the parties to the charter intended otherwise, *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 647 (5th Cir. 1989), *Hayes v. Wilh Wilhelmsen Enterprises, Ltd.*, 818 F.2d 1557, 1559 (11th Cir. 1987), *Atlantic Richfield Co. v. Interstate Oil Transport Co.*, 784 F.2d 106, 113-114 (2d Cir. 1986), no claim in admiralty lies against the

> United States and, therefore, no action can be properly maintained against it under the SIAA. *See Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989). Hence, summary judgment must be entered in favor of the United States.

Id. at 1179-1180, (footnote citations omitted, emphasis added).

As extensively discussed in Respondent's trial court memorandums, Respondent respectfully submits that it is quite clear that the operational control of the S.S. MAJOR STEPHEN W. PLESS, was at all times with Waterman Steamship Corporation, not the United States, who is a time charterer.

Under the terms of the operating contract introduced into evidence by Respondent at the September 3rd hearing, as Exhibit 4 in globo, the overall operational control of the S.S. MAJOR STEPHEN W. PLESS, remained at all times the responsibility of Waterman Steamship Corporation.[7] According to the operating contract, employees of the operator, Waterman, remained Waterman employees at all times. It is further significant that as provided in the terms of the operating contract, Waterman was to maintain insurance on the vessel at all times. (Operating Contract, pp. 2-4).

The Petitioner also has not presented any document which demonstrates that the Government has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Respondent Herbert Anderson. Instead as the operating contract clearly details, the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Respondent Herbert Anderson.

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[7] The operating contract is discussed in greater detail in the next section of this brief. Respondent has not reproduced this document in the Appendix, since it is a lengthy document, but has set out pertinent parts, in the next section for the Court's review.

Further, the fact that the Government may have directed the destination of the vessel or the ultimate destination of the cargo of the S.S. MAJOR STEPHEN W. PLESS, does not even remotely resemble the kind of operational control necessary to overcome the clear terms of the operating contract, and shift liability for Respondent's personal injuries from his employer Waterman to the United States. Thus, it is respectfully submitted that Respondent has sued the right party and that his action against his employer Waterman Steamship Corporation is not barred by the exclusivity of liability provisions of the Suits in Admiralty Act, and thus, the Trial Court Judge's ruling denying the motion for summary judgment should be upheld.

III. THE LOUISIANA SUPREME COURT WAS CORRECT IN DENYING WRITS, AND THE FOURTH CIRCUIT COURT OF APPEAL WAS CORRECT IN DENYING PETITIONER'S APPLICATION FOR SUPERVISORY WRITS AND FINDING THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER WATERMAN STEAMSHIP CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT AND LAW WHICH PRECLUDE SUMMARY JUDGMENT IN THIS MATTER.

As stated earlier, the Petitioner has not presented any document which demonstrates that the Government has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Respondent Herbert Anderson. Instead as the operating contract, clearly details, the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Respondent Herbert Anderson.

In the case at bar, the United States is a time charterer pursuant to a Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985. (An excerpt of the Time Charter party agreement was introduced into

evidence by Respondent at the September 3rd hearing as Exhibit 1). There is a bareboat charter between the owner of the S.S. MAJOR STEPHEN W. PLESS, Wilmington Trust Company, a Delaware banking corporation, and WTAK-3, Inc., a company out of New York. This bareboat charter was amended and restated as of May 1, 1985. (An excerpt of the Bareboat Charter was introduced into evidence by Respondent at the September 3rd hearing as Exhibit 2).

During discovery in this matter Petitioner produced an Operating Contract and two letters; one dated May 1, 1985 to the Commander of the Military Sealift Command and signed by the Vice President of Waterman Steamship Corporation, and one dated February 10, 1983 and signed by the President of Waterman Steamship Corporation. By far the most important document which is determinative of who had operational control over the S.S. MAJOR STEPHEN W. PLESS, is the Operating Contract between Waterman Steamship Corporation, and WTAK-3, Inc., which is dated as of May 1, 1985 and amended and restated as of June 12, 1985.

In the operating contract which Respondent obtained from Petitioner Waterman through discovery, WTAK-3 is referred to as the "Contractor", and Waterman Steamship Corporation is referred to as the "Operator". The United States of America, acting by and through the Contracting Officer, Military Sealift Command, Department of the Navy, is referred to as the Government. The operating contract refers to the Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985. (Operating Contract, p. 1).

The operating contract provides in pertinent part that:

> WHEREAS, the Contractor and the Operator desire to amend and restate the Operating Contract dated as of January 14, 1983 and first amended and restated as of May 1, 1985, to provide for the Operator to manage the Vessel and the

Containers in order to facilitate the Contractor's performance of its obligations to the Government under the Agreement to Charter and Time Charter; and

NOW, THEREFORE, the parties hereto agree to amend and restate the Operating Contract in its entirety as follows:

****

2. In order to facilitate the performance by the Contractor of its obligations under the Time Charter and the Agreement to Charter, the Contractor hereby appoints the Operator and the Operator hereby agrees to act as manager of the Vessel and the Containers and in that capacity and subject as hereinafter provided the Operator shall, during the term of this Operating Contract, have and be entrusted with the management, operation, maintenance and repair of the Vessel and the Containers and shall assist the Contractor in the full and faithful performance of the Contractor's obligations under the Time Charter and the Agreement to Charter and shall efficiently and faithfully serve the Contractor in connection with such management and the exercise of the powers hereby conferred upon the Operator. In performing its obligations and duties under this Operating Contract, the Operator shall act in a manner entirely consistent with the Contractor's obligations and duties to the Government under the Agreement to Charter and the Time Charter. Nothing in this Operating Contract shall relieve the Contractor of its duties and obligations under the Agreement to Charter or the Time Charter. All employees of the Operator engaged in the management and operation of the Vessel and the Containers hereunder

shall always be the employees of or seconded to the Operator and not employees of the Contractor for any purpose whatsoever. In performing its obligations hereunder, the Operator shall act as an independent contractor.

3. As such, the Operator shall, without in any way detracting from the generality of its duties and powers hereunder, properly maintain the Vessel and the Containers and perform the following services and act in or do all or any of the following acts in the name or on behalf of the Contractor:

****

(b) Place and maintain all insurance relating to the Vessel and the Containers in such manner and upon such terms as the Contractor shall be required to place and maintain in accordance with Articles 10 and 37 of the Time Charter, Article 12 of the Bareboat Charter and Article 12 of the Container Lease....

****

(d) Maintain all equipment, machinery and supplies necessary for the full and efficient operation of the Vessel and the Containers.

(e) Maintain the Vessel and the Containers in a good state of repair and in efficient operating condition and in accordance with good commercial practice and the requirements of the Time Charter.

(f) Arrange for and supervise drydockings, surveys, maintenance, repairs, renewals, alterations, betterments and upkeep of the Vessel and the Containers....

(g) Procure the services of the Master and all officers and crew, all of whom shall be employees of the Operator (or subject to the Time Charterer's approval, a subcontractor thereof), and superintendents, surveyors and other necessary personnel as shall be necessary or appropriate for the efficient operation and maintenance of the Vessel and the Containers.

(h) Bring or defend any such action, suit or proceeding for the account of and on behalf of the Contractor and the Vessel or the Containers, but only if such action, suit or proceeding relates to any right or obligation of the Contractor under the Time Charter, the Agreement to Charter, the Bareboat Charter or the Container Lease, or otherwise relates to the management, operation, maintenance, financing or repair of the Vessel or the Containers.

(i) Keep the Contractor and the Government thoroughly and promptly informed regarding any incident which gives or may give rise to claims or controversies involving third parties.

(Operating contract, pp. 2-4, emphasis added).

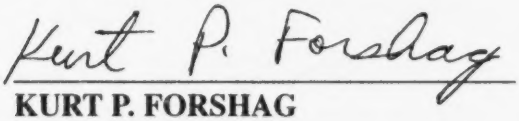
Respondent respectfully submits that considering the operating contract and the venture as a whole, it is quite clear that the operational control of the S.S. MAJOR STEPHEN W. PLESS, was at all times with Waterman Steamship Corporation, not the United States, who is a time charterer. Alternatively, there are disputed issues of material fact as to who had operational control of the S.S. MAJOR STEPHEN W. PLESS, such that summary judgment is inappropriate. *Davis v. Bd. Of Supervisors of La. State University et al,* 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied,* 98-C-1329 (La.6/26/98), 719 So.2d 1288.

CONCLUSION

The rulings of the Louisiana State Courts which Petitioner has presented to this court do not qualify as a final judgment within the meaning of 28 U.S.C. § 1257 (a). Thus, Petitioner's writ application should be dismissed for want of a final judgment.

Respondent respectfully submits that he has demonstrated through his pleadings, this Writ Opposition and the exhibits Respondent introduced in the lower courts, that he has set forth specific facts showing that there are genuine issues of material fact for trial. It is respectfully submitted that this Honorable Court should uphold the lower court's rulings and Respondent should be permitted to proceed to trial against Waterman Steamship Corporation.

Respectfully submitted,



KURT P. FORSHAG
Counsel of Record
MARK N. CARACCI,
MARTINY & CARACCI
131 Airline Drive, Suite 201
Post Office Box 8828
Metairie, Louisiana 70011
Telephone: (504) 834-7676

ATTORNEYS FOR
RESPONDENT
HERBERT ANDERSON

Supreme Court, U.S.
FILED
JUN 13 2000
CLERK

(4)

NO. 99-1746

IN THE

SUPREME COURT OF THE UNITED STATES

WATERMAN STEAMSHIP CORPORATION

PETITIONER

VERSUS

HERBERT ANDERSON

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KURT P. FORSHAG
Counsel of Record
MARK N. CARACCI,
MARTINY & CARACCI
131 Airline Drive, Suite 201
Post Office Box 8828
Metairie, Louisiana 70011
Telephone: (504) 834-7676

ATTORNEYS FOR RESPONDENT
HERBERT ANDERSON

APPENDIX

1. February 18, 2000 Louisiana Supreme Court decision . . . . . App. 1

2. December 17, 1999 ruling by the Louisiana Court of Appeal for the Fourth Circuit . . . . . App. 2

3. Judgment of the Trial Court for the Civil District Court for the Parish of Orleans, dated September 24, 1999 . . . . . App. 4

4. Reasons for Judgment of the Trial Court for the Civil District Court for the Parish of Orleans, dated October 7, 1999 . . . . . App. 6

5. Petition for Damages . . . . . App. 26

6. Exception and Answer . . . . . App. 32

7. 28 U.S.C.A. § 1257 (West 1993) . . . . . App. 38

8. 46 U.S.C.A. § 741 (West Supp. 1999) . . . . . App. 38

9. 46 U.S.C.A. § 742 (West Supp. 1999) . . . . . App. 39

10. 46 U.S.C.A. § 745 (West 1975) . . . . . App. 40

11. *Louisiana Code of Civil Procedure* art. 966 (West Supp. 2000) . . . . . App. 41

12. *Louisiana Code of Civil Procedure* art. 968 (West 1984) . . . . . App. 43

13. 28 U.S.C.A. § 1333 (West 1993) . . . . . App. 43

14. 46 U.S.C.A. § 688 (West Supp. 1999) . . . . . App. 44

APPENDIX 1

THE SUPREME COURT OF THE STATE OF LOUISIANA

HERBERT ANDERSON NO. 1999-CC-3613

VS.

WATERMAN STEAMSHIP CORPORATION

IN RE: Waterman Steamship Corporation; - Defendant; Applying for Supervisory and/or Remedial writs, Parish of Orleans, Civil District Court Div. F, Nos. 97-7697; to the Court of Appeal, Fourth Circuit, No. 99-C-2866

February 18, 2000

Denied.

HTL
PFC
WFM
CDK
BJJ
JPV
JTK

TRAYLOR, J., not on panel.

Supreme Court of Louisiana
February 18, 2000

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX 2

No. 99-C-2866

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

HERBERT ANDERSON

versus

WATERMAN STEAMSHIP CORPORATION

In Re:	WATERMAN STEAMSHIP CORPORATION
Applying for:	SUPERVISORY WRIT
Directed to:	HONORABLE YADA MAGEE, JUDGE CIVIL DISTRICT COURT, PARISH OF ORLEANS DIVISION "F", 97-07697

WRIT DENIED

We find *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989) to be dispositive in this matter and thus affirm the trial court. *Williams* states that a Jones Act negligence claim may be brought against a privately owned and operated vessel that is time-chartered to the United States. Therefore, we deny the writ in regard to Plaintiff's claim under the Jones Act.

These facts differ from *Williams* in that Plaintiff also asserts maintenance and cure and unseaworthiness claims which give rise to *in rem* liability.[1]

A cursory reading of 46 U.S.C. 741 seems to imply that

---

[1] *The Osceola,* 189 U.S. 158 (1903).

claims of maintenance and cure and unseaworthiness may not be brought against the Major Stephen Pless because it is "operated by or for the United States" and such ships cannot be "subject to arrest or seizure by judicial process." Nevertheless, the rationale of Section 741[2] is that the United States is made liable in personam via Section 742.

In this case factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty. For these reasons we deny the writ as concerns Plaintiffs claims of maintenance and cure and unseaworthiness.

New Orleans, Louisiana this 17th day of December, 1999.

s/s MEK
JUDGE MICHAEL E. KIRBY

s/s RJK
CHIEF JUDGE ROBERT J. KLEES

s/s RAK
JUDGE ROBERT A. KATZ

---

[2] The exact language is: "in view of the provision herein made for a libel in personam." This language refers to Section 742.

APPENDIX 3

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

On September 3, 1999, a hearing was held on Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action and Defendant Waterman Steamship Corporation's Motion for Summary Judgment.

PRESENT: KURT P. FORSHAG, Attorney for Plaintiff Herbert Anderson;

JOHN R. FITZGERALD, Attorney for Defendant Waterman Steamship Corporation.

After considering the Motions, Memorandums and Exhibits filed by Defendant Waterman Steamship Corporation; *Plaintiff Herbert Anderson's Memorandum in Opposition to*

Defendant Waterman Steamship Corporation's Exception of No Right of Action or No Cause of Action; Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Motion for Summary Judgment; Plaintiff Herbert Anderson's Statement of Contested Material Facts; the Exhibits attached to Plaintiff's Memorandums, which were marked, filed, and introduced into evidence, and the argument of counsel, the Court made the following rulings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action are overruled;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Motion for Summary Judgment is denied.

JUDGMENT READ, AND SIGNED IN CHAMBERS THIS 24th DAY OF Sept., 1999, AT NEW ORLEANS, LOUISIANA.

s/s Yada T. Magee
JUDGE

APPENDIX 4

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

On September 3, 1999, a hearing was held on Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action and Defendant Waterman Steamship Corporation's Motion for Summary Judgment.

After considering the Motions, Memorandums and Exhibits filed by Defendant Waterman Steamship Corporation; *Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Exception of No Right of Action or No Cause of Action; Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Motion for Summary Judgment; Plaintiff Herbert Anderson's Statement of Contested Material Facts;* the Exhibits attached to Plaintiff's Memorandums, which were marked, filed, and introduced into evidence, and the argument of counsel, the Court issues the following Reasons for Judgment:

On May 1, 1996, Plaintiff, Herbert Anderson, (hereinafter referred to as "Plaintiff"), was employed by Waterman Steamship Corporation, (hereinafter referred to as "Defendant"), as a Seaman and Assistant Cook Utility of the crew. Plaintiff was permanently assigned to a vessel in navigation which Plaintiff contends was being operated by his employer Defendant Waterman Steamship Corporation. The vessel was named the S.S. MAJOR STEPHEN W. PLESS.

On May 1st, 1996, Plaintiff was engaged in the course and scope of his employment aboard the S.S. MAJOR STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

Plaintiff alleges that on that date, an employee or employees of Waterman Steamship Corporation who was working on the boat on or about May 1, 1996, carelessly left an object or objects on the floor of the meat box of the galley, on the S.S. MAJOR STEPHEN W. PLESS, which caused Plaintiff Herbert Anderson to trip, slip, or otherwise fall over the object or objects on the floor and into a rack or shelf in the galley. Plaintiff alleges that he sustained injuries as a result of this accident. Plaintiff further alleges that he does not know the name of the person or persons who left the object or objects on the floor, but believes they were employees of Waterman.

In Plaintiff's *Petition for Damages* filed in this matter he has alleged that he has a right of action against Waterman, his employer, under both the general maritime law as well as in his capacity as a seaman. Plaintiff is making not only a Jones Act negligence claim, but also claims for unseaworthiness and maintenance and cure.

I. PLAINTIFF'S RIGHT OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

Defendant alleged in its Exception that "....by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act, 46 USC §§ 741-745, Herbert Anderson has no cause of action and/or no right of action against Waterman Steamship Corporation."

(Defendant's Exception of No Right of Action or No Cause of Action, p. 1).

Defendant in its Memorandum in support of the exceptions contended that Plaintiff "....has no cause of action and no right of action against Waterman Steamship Corporation, since his exclusive remedy is against the United States." (Defendant's Memorandum in Support of Exception of No Right of Action or No Cause of Action, p. 1).

However, for the reasons to be discussed in the next section, the Court determines that Plaintiff does have a cause of action and a right of action against his employer Waterman Steamship Corporation for the injuries he alleges he suffered while working aboard the S.S. MAJOR STEPHEN W. PLESS.

The Louisiana Fourth Circuit Court of Appeal recently discussed the exception of no cause of action in *Dragon v. Cooper/T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006. In *Dragon, supra,* the Fourth Circuit stated that:

> The purpose of an exception of no cause of action is to determine the sufficiency in the law of the petition. The exception is triable on the face of the papers and for the purposes of determining the issues raised by the exception, the well pleaded facts in the petition must be regarded as true. *City of New Orleans v. Board of Com'rs,* 93-0690 (La. 7/5/94), 640 So.2d 237, 241. The standard for granting an exception of no cause of action is as follows:
>
> The burden of demonstrating that no cause of action has been stated is upon the mover or exceptor. In deciding the exception of no cause of action, the court must presume all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party. In reviewing a trial court's ruling sustaining an exception of no cause of action, the court of appeal and the {supreme} court should subject the

case to de novo review because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition.

In appraising the sufficiency of the petition we follow the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. The question therefore is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. The petition should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the petition to determine if the allegations provide for relief on any possible theory.

640 So.2d at 253 (citations omitted).

Id. at 98-1375, at pp. 2-3; 726 So.2d at 1007-1008.

In *Jefferson Downs Corp., Inc. v. Louisiana State Racing Commission,* 98-1229, 98-1230, 98-1231, (La. App.4th Cir.1/13/99), 727 So.2d 644, the Louisiana Fourth Circuit discussed the exceptions of no cause of action and no right of action. In *Jefferson Downs, supra,* the Court held that:

Exception of no cause of action

Although the procedural history and issues are complicated in this case, the fact remains that the only effect of Commission's rulings are to issue documents allowing Evangeline Downs to cause a referendum election in St. Landry Parish. However, review of the pleadings, in light of the applicable Louisiana state law, reveals that the trial court

correctly dismissed the petition for judicial review on the exception of no cause of action.

The applicable law on this issue has recently been summarized by the Louisiana Supreme Court in *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La. 11/30/94), 646 So.2d 885, a case cited by Livingston Downs, as follows:

> An action can only be brought by a person having a real and actual interest which he asserts. La. Code Civ. Proc. Art. 681. The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. Art. 927 (5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie-Bailey Drilling Co.,* 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation....

Id. at 98-1229, 98-1230, 98-1231, p. 6; 727 So.2d at 646-647. (Citation omitted).

The Court finds that from the allegations in Plaintiff's *Petition* filed into the record in this matter, as well as the applicable law on this issue, that Herbert Anderson has a real and actual interest in this action. He fits within the class of persons to whom the law grants the causes of action asserted in his *Petition for Damages*. Thus, Defendant Waterman Steamship Corporation's Exception of No Right of Action is overruled.

II. PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

The initial inquiry is what law governs in a maritime personal injury case such as the one at bar. The Louisiana Supreme Court in *Prejean v. Industrial Cleanup, Inc., et al,* 98-0948 (La. 12/1/98), 721 So.2d 1273, stated that: "....State courts must apply the same law to a maritime claim that a federal court would apply had the case been filed in federal court. 1 *Benedict on Admiralty* (MB) § 112 (7th ed. 1998)". *Id.* at 98-0948 at p. 9; 721 So.2d at 1278.

In *Dragon v. Cooper/T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006, cited earlier in these Reasons for Judgment, the Louisiana Fourth Circuit Court of Appeal stated that:

> State courts exercising maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So.2d 89, 94....
>
> *Id.* at 98-1375 at p. 7; 726 So.2d at 1009.

In *Holmes v. Daybrook Fisheries, Inc.*, 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, *writ application pending*, 99-C-1571 (filed June 1, 1999), the Fourth Circuit stated that:

> Admiralty claims may be brought in federal court pursuant to its admiralty jurisdiction or in state court under the savings to suitors clause; in either case, federal substantive maritime law applies....

Id. at 98-1824 at pp. 2-3; 730 So.2d at 1008. (Citation omitted).

The United States Fifth Circuit Court of Appeal discussed the very issue raised by Defendant in their no cause of action exception, in *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989), *cert denied,* 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990).[3] In *Williams, supra,* Ballard Williams, a seaman who was employed by Central Gulf Lines, aboard its vessel the S/S Bay became ill while on board, and after being transferred to a hospital, subsequently died. The representative of his estate, Williams, filed suit against Central Gulf pursuant to the general maritime law and the Jones Act, 46 U.S.C. § 688, alleging various acts of negligence. *Id.* at 1059.

The Fifth Circuit described the procedural events leading up to the appeal as follows:

> During discovery it was revealed that, at the time of Ballard's death, the S/S Bay was

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[3] The Louisiana Supreme Court in *Vendetto vs. Sonat Offshore Drilling Co.,* 97-3103 (La. 1/20/99); 725 So.2d 474, *rehearsing denied,* _____ So.2d _____, 97-3103 (La. 2/12/99), *U.S. cert den.* _____ U.S. _____, 119 S.Ct. 2369, 2370 (1999), discussed by Plaintiff in his memorandum, when discussing a recent maritime federal Fifth Circuit case, noted that they were "not bound by the Fifth Circuit's decision...." *Id.* at 97-3103, at p. 9; 725 So.2d at 478-479. Thus, while technically this state court may not be bound by federal Fifth Circuit law, the Court finds that the Fifth Circuit's reasoning is persuasive authority for this Louisiana State court, and thus adopts it.

> under a time charter to the United States for use by the Military Sealift Command, an agency of the Department of the Navy. Central Gulf moved for summary judgment or, alternatively, to dismiss on the grounds that, pursuant to the Suits in Admiralty Act's exclusivity provision, the plaintiff's sole remedy was a claim against the United States. The district court agreed with Central Gulf's interpretation of the Suits in Admiralty Act and because the United States had not been named as a party-defendant, dismissed the suit. The appellant since filed a timely notice of appeal.
>
> *Id.* at 1059.

The Suits in Admiralty Act as discussed by the Court in *Williams, supra,* in pertinent part provides as follows:

> **§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims**
>
> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim:...
>
> 46 U.S.C.A. § 745 (West 1975).

In *Williams, supra,* the Defendant Central Gulf argued on appeal that since the Public Vessels Act or alternatively, the Suits in Admiralty Act provided a remedy for Plaintiff against the United

States, that Section 745, thus operated as a bar to Plaintiff's claim against Central Gulf. *Id.* 874 F.2d at 1060. The Fifth Circuit however after carefully examining legislative history, as well as the relevant case law, concluded that neither the Suits in Admiralty Act nor the Public Vessels Act provided a remedy to Plaintiff against the United States under the facts present in *Williams,* and thus, "that the exclusivity provision, therefore, does not bar suit against Central Gulf." *Id.*

The Court in *Williams,* next extensively discussed the Suits in Admiralty Act. In *Williams, supra,* the Court discussed this issue as follows:

> **IV. THE SUITS IN ADMIRALTY ACT**
>
> The exclusivity provision may bar the appellant's suit against Central Gulf "where a remedy {against the United States} is provided by {the Suits in Admiralty Act}." 46 U.S.C. App. § 745. As mentioned above, this court recognized that the provisions of the Suits in Admiralty Act do not themselves *provide* a remedy. Rather, the Act merely acts to waive the United States immunity so as to furnish a "jurisdictional hook on which to hang a traditional admiralty claim." *Trautman,* 693 F.2d at 444. In light of *Trautman,* we view the issue of whether a remedy against the United States *is provided* by the Suits in Admiralty Act as entailing a two part inquiry. First, we must ask whether the United States has consented to suit given the facts at hand. This is the "jurisdictional hook" inquiry and involves applying the Act's statutory language to the present circumstances. If a jurisdictional hook is found to exist, we must then ask whether the party attempting to invoke the exclusivity provision as a defense to suit has shown that "a traditional admiralty claim" could

have been stated against the United States. Only by satisfying this two part test can it be concluded that "a remedy is provided by {the Suits in Admiralty Act}" so as to justify barring plaintiffs from bringing suit against private entities such as Central Gulf.

A. The "Jurisdictional Hook" Inquiry

As discussed, Central Gulf owned the S/S Bay, the vessel on which Ballard became ill. Pursuant to a written agreement, Central Gulf time chartered the vessel to the United States but retained possession and control of the vessel's day-to-day operations. *See supra* Articles 31 and 22(a) of the charter agreement. The United States controlled the cargoes carried and ports of call and destination to which the vessel sailed.

Based on these relationships, Central Gulf argues that the Suits in Admiralty Act functions to waive the United States' sovereign immunity thus establishing a jurisdictional hook. We agree....

****

In view of the 1960 amendment, if a proceeding in admiralty could be asserted against a private person in the Government's position, then the Suits in Admiralty Act will provide a jurisdictional hook on which to hang a claim against the Government. Had a private person time chartered the S/S Bay, we are persuaded that, based on notions of operational control, such persons could be subject to suit for the negligence alleged herein. Thus, by operation of the 1960 amendment to the Suits in Admiralty Act, the Government, under the present circumstances, has consented to suit as if a private person were involved.

B. The "Traditional Admiralty Claim" Inquiry

The Suits in Admiralty Act will not "provide a remedy" as envisioned by section 745's exclusivity provision unless, when the action arose, principles of maritime law would have allowed the appellant to state a claim against a private person in the same position as the Government, i.e. against a private time charterer. This Circuit's general rule is that a time charterer " 'who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.' " *P&E Boat Rentals, Inc. v. Ennia General Insurance Co., Inc.*, 872 F.2d 642, 647 (5th Cir. 1989) (quoting *Mallard v. Aluminum Co. of Canada, Inc.*, 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981)). *See also* M.J. Norris, *The Law of Maritime Personal Injuries 3d*, § 130 (1987). The term "control" as used by this court in formulating this general rule refers to operational control of the vessel, not ultimate control of its destination or cargos.

Article 22(a) of the present charter agreement patently states that '[t]he Master of the Vessel...shall not be under the direction of the Charterer as regards navigation, care and custody of the Vessel and care of the cargo." We find that, by operation of this provision, the United States acquired no operational control over the vessel. Although the charter provides that the United States shall bear certain costs, responsibility for costs "in and of itself does not transfer operational responsibility from the owner." *Mallard*, 634 F.2d at 242 n. 5. Indeed, "this circuit seems reluctant to find any shift of operational responsibility

for personal injuries to the time charterer absent clear language to that effect." *Id.* The charter contains no clear language whereby the United States assumes responsibility for the vessel's operations or for the personal injuries caused by the negligence of the crew. We therefore hold that operational control did not shift from Central Gulf to the United States and that, given the specific facts at hand, the appellant would have been unable to state a claim against the United States as time charterer.

V. CONCLUSION

Application of our two part inquiry indicates that the second prong, i.e. the existence of a traditional admiralty claim prong, has not been met. Because a jurisdictional hook alone does not suffice to "provide a remedy" under the Suits in Admiralty Act, section 745's exclusivity provision does not operate to bar suit against Central Gulf. We therefore, VACATE the dismissal of the appellant's claims and REMAND for proceedings not inconsistent with this opinion.

Id. at 1061-1063. (Emphasis added).

The Court finds the reasoning in *Williams, supra,* to be persuasive and adopts the "operational control" test in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further adopts Plaintiff's argument that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. *See Also: Favorite v. Marine Personnel and Provisioning, Inc.*, 955 F.2d 382, 384-385, 388 (5th Cir. 1992); *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 441-444 (5th Cir. 1982); *Servis v. Hiller Systems Inc.*, 54

F.3d 203, 208 (4th Cir. 1995), *cert. den.*, 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996); *Morales-Melendez v. Steamship Mut.*, 763 F. Supp. 1174, 1175-1176, 1179-1180 (D. Puerto Rico 1991); *Nakano v. United States of America and Vessel Charters, Inc.*, 1988 AMC 2220, (U.S.D.C. So. Dist. Cal. 1988); *Nelson v. Research Corp. Of University of Hawaii*, 805 F. Supp. 837, 846-848 (D. Hawaii 1992).

The Court further finds that several of the cases cited by Defendant Waterman: *Pineiro v. United States*, 65 F. Supp. 191 (Dist. Ct., N.D. Cal.,S.D. 1945); *Burkholder v. United States*, 60 F. Supp. 700 (Dist Ct., E.D. Penn. 1945) (On Reargument); *Epstein v. United States*, 86 F. Supp. 740 (U.S.D.C., S.D. N.Y. 1949); and *Western Tankers Corporation v. United States*, 1975 AMC 775 (U.S.D.C., S.D. N.Y. 1975), appear to use an "operated by or for" test to determine whether or not the exclusivity provisions of the Suits in Admiralty Act applies.

The Court however, as stated earlier, agrees with Plaintiff that the more modern "operational control" test should be used in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured.

The Court further finds that based on Plaintiff's exhibits, that in the case at bar, the United States is a time charterer pursuant to a Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985.

The Court finds that in considering the arguments of Plaintiff, he has demonstrated through his pleadings, his memorandums and the exhibits attached thereto, as well as his Petition for Damages, Statement of Contested Material Facts, and all other pleadings and exhibits on file in the record of this matter, that he has set forth specific facts showing that Plaintiff has sued the right party and that his action against his employer Waterman Steamship Corporation is not barred by the exclusivity of liability provisions of

the Suits in Admiralty Act, and thus, Defendant's Exception of No Cause of Action is overruled.

III. SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS MATTER.

As stated earlier, the Court adopts Plaintiff's argument that the test used by the Courts and more particularly the Federal Fifth Circuit, in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies, is "operational control". That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further finds that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure.

For the purposes of Defendant's motion for summary judgment, it is significant that the federal Fifth Circuit in *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982), indicated that the question of whether or not the Government exercised sufficient operational control of the vessel, to be held liable for an injured Plaintiff's injuries, is a question of fact.

In *Trautman, supra,* the Fifth Circuit explained this as follows:

> We must now turn to appellant's substantive arguments relating to whether Steber was an agent of the United States and/or whether the United States was in sufficient operational control of Steber's activities in order to cause the United States to be liable under the Jones Act, 46 U.S.C. § 688, for the negligence of Steber which caused or contributed to appellant's injuries. Appellant contends that the combination of Boyd's visits to the barge, the contract change for the work on the Mecca, and the designation of the civilian members of the operation as part of the "Force" in the Egyptian/United States agreement is sufficient to demonstrate that Steber was an agent of the

> United States and/or under its operational control. Although appellant couches this argument in terms of an improper determination of the legal standards to be applied, we believe that the question is really one of fact to which our review is limited to the clearly erroneous standard as announced in *McAllister, supra.*

Id. at 445, (emphasis added). [4]

The Louisiana Fourth Circuit Court of Appeal recently discussed the standard for evaluating summary judgments in *Davis v. Bd. Of Supervisors of La. State University et al,* 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied,* 98-C-1329 (La. 6/26/98), 719 So.2d 1288. In *Davis supra,* the Fourth Circuit held that:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion requires him only to point out to the court that there is an

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[4] Buck Steber, Inc., (Steber), hired Appellant Trautman as one of the divers to carry out its part of a subcontract involving diving services necessary for the removal of sunken vessels in the Suez Canal. *Id.* at 442.

absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C(2).

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; *Townley v. City of Iowa,* 97-493 (La. App. 3 Cir. 10/29/97); 702 So.2d 323, 326.

The amended article 966 substantially changes the law of summary judgment. Under the prior jurisprudence, summary judgment was not favored and was to be used only cautiously and sparingly. The pleadings and supporting documents of the mover were to be strictly scrutinized by the court, while the documents submitted by the party in opposition were to be treated indulgently. Any doubt was to be resolved against granting summary judgment, and in favor of trial on the merits. *Sassone v. Elder,* 626 So.2d 345 (La. 1993). The jurisprudential presumption against granting the summary judgment was legislatively overruled by La. C.C.P. art. 966 as amended. The supporting documentation submitted by the parties is to scrutinized equally and the overriding presumption in favor of trial has been deleted. Once the motion for summary judgment has been properly supported by the mover, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting ofthe motion. The amendment

> to La. C.C.P. art. 966 brings Louisiana's standard for summary judgment closely in line with the federal standard under Fed. Rule Civ. Proc. 56(c)....
>
> ****
>
> In construing the federal summary judgment rule, the United States Supreme Court held that summary judgment shall be granted where the evidence is such that it would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). If a defendant in an ordinary civil case moves for summary judgment or a directed verdict based on the lack of proof of a material fact, the judge must ask himself whether a fair-minded jury could return a verdict for the non-moving party on the evidence presented. *Id.* The *Anderson* court further held that the mere existence of a scintilla of evidence on the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for that party....
>
> *Id.* at 97-0382 at pp. 7-9; 709 So.2d at 1033-34. (String citations omitted).

The Louisiana Fifth Circuit Court of Appeal recently discussed what constitutes a "material fact". In *Azreme, Corp. v. Esquire Title Corp.*, 98-1179 (La. App. 5th Cir. 3/30/99), 731 So.2d 422, the Fifth Circuit stated that:

> . . . . The amended version of LSA-C.C.P. art. 966 now proclaims that the summary

judgment procedure is favored and shall be construed to accomplish the ends of just, speedy, and inexpensive determination of allowable actions. *Tonubbee v. River Parishes Guide,* 97-440 (La. App. 5th Cir. 10/28/97), 702 So.2d 971. The plaintiff filed the summary judgment motion in this case. Under the amended version of LSA-C.C.P. art. 966, the burden of proof remains on the mover to show "that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." *Id.* at 974. A material fact is one that would matter on the trial of the merits. *J.W. Rombach, Inc. v. Parish of Jefferson,* 95-829 (La. App. 5th Cir. 2/14/96), 670 So.2d 1305. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. *Id.* at 1308.

****

. . . . If the supporting documents produced by the mover are sufficient to resolve all material fact issues, then the burden of proof shifts to the opposing party to present evidence that material facts are still in dispute. *Herman v. Rome,* 95-666 (La. App. 5th Cir. 1/17/96), 668 So.2d 1202. If the supporting documents are not sufficient to resolve all material fact issues, summary judgment must be denied. *Id.*

Id. at 98-1179, at pp. 5-6; 731 So.2d at 425, (emphasis added).

The Court adopts Plaintiff's argument that there are disputed issues of material fact and law as to the following, such that summary judgment is inappropriate in this matter:

1. There are disputed issues of material fact as to who had operational control of the S.S. MAJOR STEPHEN W. PLESS, such that summary judgment is inappropriate.

2. There are disputed issues of material fact as to whether or not the overall operational control of the S.S. MAJOR STEPHEN W. PLESS, remained at all times the responsibility of Defendant Waterman Steamship Corporation, such that summary judgment is inappropriate.

3. There are disputed issues of material fact as to whether or not the intent of the parties is to place Defendant Waterman with responsibility for its employees and for any personal injuries which Waterman employees sustain while carrying out their duties, such that summary judgment is inappropriate.

4. There are disputed issues of material fact and law as to whether or not the United States has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Plaintiff Herbert Anderson such that summary judgment is inappropriate.

5. There are disputed issues of material fact and law as to whether or not the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Plaintiff Herbert Anderson, such that summary judgment is inappropriate.

6. There are disputed issues of material fact and law as to whether or not the fact that the Government may have directed the destination of the vessel or the ultimate destination of the cargo of the S.S. MAJOR STEPHEN W. PLESS, constitutes the kind of operational control necessary to overcome the clear terms of the operating contract, and shift liability for Plaintiff's personal injuries from his employer Waterman to the United States. Thus, summary judgment is inappropriate.

CONCLUSION

For the reasons discussed in these *Reasons for Judgment,* the Court makes the following rulings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action are overruled;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Motion for Summary Judgment is denied.

REASONS FOR JUDGMENT READ, AND SIGNED IN CHAMBERS THIS 7th DAY OF OCTOBER, 1999, AT NEW ORLEANS, LOUISIANA.

s/s Yada T. Magee
JUDGE

APPENDIX 5

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel plaintiff Herbert Anderson, a person of the full age of majority, a resident and domiciliary of the Parish of Orleans, State of Louisiana, respectfully represents:

I.

Made defendant herein is Waterman Steamship Corporation, a foreign corporation, authorized to do and/or actually doing business in the Parish of Orleans, State of Louisiana, and within the jurisdiction and venue of this Honorable Court.

II.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was employed by defendant, Waterman Steamship Corporation, as a Seaman and Assistant Cook Utility of the crew and permanently assigned to a vessel or fleet of vessels in navigation that were owned and operated by defendant Waterman Steamship Corporation, which vessels include the S.S. MAJ. STEPHEN W. PLESS.

III.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was engaged in the course and scope of his employment aboard the MAJ. STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

IV.

On or about May 1, 1996, petitioner was caused by defendant to sustain injuries to his psyche and body as a result of the negligent acts of defendant, and its agents, servants, employees, and the unseaworthiness of the vessels under its custody and control.

V.

On or about May 1, 1996, petitioner, while employed as an Assistant Cook Utility aboard the S.S. MAJ. STEPHEN W. PLESS, was working in the meat box of the galley with the steward when he was caused to trip, slip or otherwise fall over an object on the floor and into a rack or shelf in the galley.

VI.

As a result of the foregoing accident, petitioner was caused to sustain injury to his shoulder and back, including but not limited to, a disc injury and possible tendon perforation of the right shoulder, as well as other parts of his body, the full residuals of such injuries are unknown but severe.

VII.

Following the accident, defendant paid petitioner maintenance and cure benefits for a period of time. However, defendant terminated payment of those benefits without lawful authority

and despite demand, has arbitrarily and capriciously failed and/or refused to reinstate payment of plaintiff's maintenance and cure benefits.

VIII.

Pursuant to the subject matter of this lawsuit as set forth herein, defendant is liable to petitioners as follows:

IX.

COUNT ONE

The aforesaid injuries to the petitioner were directly and proximately caused by the negligent acts of commission and/or omission on the part of defendant Waterman Steamship Corporation including, but not limited to, defendant's failure to provide petitioner, as its employee, with a reasonably safe place to work, and failure to assign petitioner to a seaworthy vessel or fleet of vessels, its failure to warn petitioner of impending dangerous perils, its failure to provide petitioner with sufficient assistance from crewmembers which would have enabled him to perform his assigned work with a reasonable degree of safety, failure of its superior officers to supervise or to be attentive with respect to the operation underway at the time petitioner was injured, and other negligent acts of commission and/or omission as will be shown at the trial of this matter.

X.

SECOND COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove, additionally, and/or in the alternative, alleges that defendant Waterman Steamship Corporation, is liable to petitioner under the General Maritime Law for breach of the warranty of seaworthiness, extending to the vessel or vessels involved herein, including but not limited to, the S.S. MAJ. STEPHEN PLESS. The aforesaid injuries suffered by the petitioner

were also directly and proximately caused by the unseaworthiness of the defendant's vessels, including but not limited to, the defendant subjecting petitioner to injury as a result of an inadequate and/or incompetent crew and its failure to furnish the tools, coworkers, or equipment necessary for petitioner to perform his duties in a reasonably safe manner, all which caused the injuries sustained by petitioner.

XI.

THIRD COUNT

In addition, petitioner, while reiterating and realleging each and every allegation made hereinabove, alleges that he was injured performing work as a Seaman and as a member of the crew of a vessel and/or vessels in the employment of Waterman Steamship Corporation, and sustained the injuries complained of in the service of the vessel and/or vessels, so as to be entitled to maintenance and cure, both past and future, until such time as he in fact reaches maximum cure, as well as entitlement to damages and attorney's fees for defendant's arbitrary and capricious termination of his maintenance and cure.

XII.

FOURTH COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove, additionally alleges that as a result of defendant's refusal to provide maintenance and cure, petitioner's injuries have worsened, his ultimate physical recovery has been delayed, and he has been caused to suffer pain and mental anguish that he otherwise would not have incurred.

XIII.

As a direct result of the aforesaid incident and the negligence of the defendant Waterman Steamship Corporation, as well as the unseaworthiness of the defendant's vessels and defendant's refusal to furnish maintenance and cure to petitioner, Herbert Anderson, has suffered severe physical pain and keen mental anguish, has undergone medical treatment, has lost substantial sums of money he otherwise would have earned, has been disabled from and/or severely handicapped in his pursuit of gainful employment and other daily activities, and these conditions may continue, worsen, or become permanent in time, and the full residuals may be severe; all of which entitles petitioner to all damages which are reasonable under the circumstances for past, present and future pain, suffering and mental anguish; disability; past and future loss of wages, including impairment of earning capacity; past and future medical expenses; past and future maintenance; and lost {sic} of life's pleasures. Petitioner's claims exceed the requisite amount for this court's subject matter jurisdiction.

XIV.

Petitioner's injuries and resulting damages were legally and proximately caused by the fault, including the negligence, of the defendant, its officers, agents, employees, and those for whom it is legally responsible, as well as by reason of the unseaworthiness of the S.S. MAJ. STEPHEN W. PLESS. The claims against defendant are asserted by petitioner as a seaman under the Jones Act, 46 U.S.C. § 688, under the substantive provisions of the general maritime law of the United States, including the warranty of seaworthiness, which has been breached by defendant herein, and under any other federal or state statute which may be applicable. The jurisdiction of this court is premised on the "savings to suitors" clause. In the alternative, and only in the alternative, that petitioner is held not to be a seaman within the meaning of the Jones Act, petitioner alleges that he is entitled to recover from defendant for negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act and/or the law of the State of Louisiana.

XV.

Petitioner prays that he be declared a Seaman by this Court.

XVI.

Petitioner is entitled to and prays for a trial by jury.

WHEREFORE, petitioner, Herbert Anderson, respectfully prays that defendant be served with a copy of this petition and be duly cited to appear and to answer, and that, after legal delays and due proceedings had, there be judgment herein in favor of petitioner, Herbert Anderson, and against defendant, Waterman Steamship Corporation, for all damages as are reasonable under the premises. Petitioner additionally prays for such amounts as the court may deem fit for continuing maintenance and cure payments and attorney's fees and petitioner further prays for legal interest on all said amounts, including prejudgment interest, until paid in full, as well as for the full costs and disbursement of these proceedings, and all general and equitable relief as the court may deem appropriate herein.

Respectfully submitted,

GAINSBURGH, BENJAMIN, DAVID MEUNIER, NORIEA AND WARSHAUER

BY: s/s Jeffery A. Mitchell
NICK F. NORIEA, JR. # 10036
JEFFERY A. MITCHELL, # 19711

PLEASE SERVE:

Waterman Steamship Corporation
through its agent for service of process
George Denegre
201 St. Charles Ave.
50th Floor
New Orleans, La. 70170

APPENDIX 6

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-07697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____

DEPUTY CLERK

EXCEPTION AND ANSWER

NOW INTO COURT, through undersigned counsel, comes defendant, Waterman Steamship Corporation, and answers the Petition for Damages of Herbert Anderson as follows:

EXCEPTION

The Petition for Damages fails to state a claim or cause of action upon which relief can be granted.

ANSWER

AND NOW, answering the particular allegations of said Petition for Damages, Waterman Steamship Corporation responds as follows:

I.

The allegations of Paragraph I are denied for lack of sufficient information to justify a belief as to their truth and veracity.

II.

The allegations of Paragraph II are denied for lack of sufficient information to justify a belief as to their truth and veracity.

III.

The allegations of Paragraph III are denied for lack of sufficient information to justify a belief as to their truth and veracity.

IV.

The allegations of contained in Paragraph IV of the Petition for Damages are denied.

V.

The allegations of Paragraph V of the Petition for Damages are denied.

VI.

The allegations of Paragraph VI of the Petition for Damages are denied.

VII.

Waterman Steamship Corporation admits that it paid Petitioner maintenance and cure benefits for a period of time; however, the remainder of the allegations of said Paragraph VII are denied.

VIII.

The allegations contained in Paragraph VIII of the Petition for Damages are denied.

IX.

The allegations contained in Paragraph IX of the Petition for Damages are denied.

X.

The allegations contained in Paragraph X of the Petition for Damages are denied.

XI.

The allegations contained in Paragraph XI of the Petition for Damages are denied.

XII.

The allegations contained in Paragraph XII of the Petition for Damages are denied.

XIII.

The allegations contained in Paragraph XIII of the Petition for Damages are denied.

XIV.

The allegations contained in Paragraph XIV of the Petition for Damages are denied.

XV.

The allegations contained in Paragraph XV require no response from this defendant, however, to the extent a response is deemed required, the allegations are denied.

XVI.

The allegations contained in Paragraph XVI require no response from this defendant, however, to the extent a response is deemed required, the allegations are denied.

AFFIRMATIVE DEFENSES

Waterman Steamship Corporation respectfully submits the following affirmative defenses and reserves its right to submit additional affirmative defenses as discovery is undertaken and additional facts become known.

XVII.

Plaintiff's injuries, if any, were caused solely through his own fault and neglect in failing to follow safe practices reasonably available and known to him. Said fault and neglect serves as a complete bar to or in diminution of any claims plaintiff may have against defendant herein.

XVIII.

Plaintiff's injuries, if any, were caused solely through the fault and neglect of plaintiff and/or others for whom Waterman Steamship Corporation cannot be held legally responsible.

XIX.

Plaintiff has failed to mitigate his damages as required by law and as a result of his failure to mitigate damages, plaintiff is barred from pursuing any claims for loss or diminution of wage earning capacity.

XX.

Plaintiff has received the appropriate maintenance

and cure and he is not entitled to further maintenance and cure.

XXI.

Plaintiff has reached maximum medical improvement from any injuries that he allegedly sustained while in the employ of Waterman Steamship Corporation and he is not entitled to further maintenance and cure.

XXII.

To the extent plaintiff's claims, if any, exceed the value of any vessel owned by defendants, Waterman Steamship Corporation reserves its right to seek limitation under all federal laws entitling it to exoneration from and/or limitation of liability.

XXIII.

Waterman Steamship Corporation avers that any injuries sustained by plaintiff were caused by risks incident to his alleged employment which risks were assumed by the plaintiff and for which Waterman Steamship Corporation is neither responsible nor liable.

WHEREFORE, Waterman Steamship Corporation prays that this its Answer be deemed good and sufficient, and that after due proceedings are had that there be judgment rendered herein in favor of Waterman Steamship Corporation and against the plaintiff, Herbert Anderson, dismissing the plaintiff's Petition for Damages with prejudice at plaintiff's costs and for all further general and equitable relief.

Respectfully submitted,

s/s Wayne G. Zeringue, Jr.

WAYNE G. ZERINGUE, JR.
(#18516)
Jones, Walker,
Waechter, Poitevent, Carrere
& Denegre, L.L.P.
201 St. Charles Ave. – 48th Floor
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8682
Attorney for Waterman Steamship
Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been properly mailed to all counsel of record on this 19th day of May 1997.

s/s Wayne G. Zeringue, Jr.

WAYNE G. ZERINGUE, JR.

APPENDIX 7

28 U.S.C.A. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C.A. § 1257 (West 1993).

APPENDIX 8

46 U.S.C.A. § 741

§ 741. Exemption of United States vessels and cargoes from arrest or seizure

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no

cargo owned or possessed by the United States or by such corporation, shall after March 9, 1920, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Canal Commission.

46 U.S.C.A. § 741 (West Supp. 1999).

APPENDIX 9

46 U.S.C.A. § 742

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

46 U.S.C.A. § 742 (West Supp. 1999).

APPENDIX 10

46 U.S.C.A. § 745

§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest.

46 U.S.C.A. § 745 (West 1975).

APPENDIX 11

Louisiana Code of Civil Procedure **art. 966**

Art. 966. Motion for summary judgment; procedure

A. (1) The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

(2) The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.

B. The motion for summary judgment and supporting affidavits shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.

C. (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.

(2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

D. The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.

E. A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.

F, G. Repealed by Acts 1997, No. 483, § 3, effective July 1, 1997.

Louisiana Code of Civil Procedure art. 966 (West Supp. 2000)

APPENDIX 12

***Louisiana Code of Civil Procedure* art. 968**

Art. 968. Effect of judgment on pleadings and summary judgment

Judgments on the pleadings, and summary judgments, are final judgments and shall be rendered and signed in the same manner and with the same effect as if a trial had been had upon evidence regularly adduced. If the judgment does not grant mover all of the relief prayed for, jurisdiction shall be retained in order to adjudicate on mover's right to the relief not granted on motion.

An appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment.

Louisiana Code of Civil Procedure art. 968
(West 1984)

APPENDIX 13

28 U.S.C.A. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C.A. § 1333 (West 1993).

APPENDIX 14

46 U.S.C.A. § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of

the United States at the time of the incident giving rise to the action if the incident occurred-

> **(A)** while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources-including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> **(B)** in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person-

> **(A)** under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

> **(B)** under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

46 U.S.C.A. § 688 (West Supp. 1999).

Respectfully submitted,

Kurt P. Forshag

KURT P. FORSHAG
Counsel of Record
MARK N. CARACCI,
MARTINY & CARACCI
131 Airline Drive, Suite 201
Post Office Box 8828
Metairie, Louisiana 70011
Telephone: (504) 834-7676

ATTORNEYS FOR
RESPONDENT
HERBERT ANDERSON

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

NO. 99-1746

IN THE SUPREME COURT
OF THE UNITED STATES

October, 1999 Term

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

versus

HERBERT ANDERSON,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE LOUISIANA SUPREME COURT

REPLY TO OPPOSITION TO PETITION FOR *CERTIORARI* OF WATERMAN STEAMSHIP CORPORATION

JOHN R. FITZGERALD
McALPINE, PEULER & COZAD
701 S. Peters Street, Suite 300
New Orleans, LA 70130
Phone: (504) 561-0323
Fax: (504) 528-9442
Counsel for Waterman S.S. Corp.

TABLE OF CONTENTS

Page

STATUTES:

28 U.S.C. section 1257 ..... 1, 2

46 U.S.C. section 741 ..... 2, 3, 9

46 U.S.C. section742 ..... 4, 8, 9

46 U.S.C. section 745 ..... 1, 2, 9

CASES:

Adams v. Robertson, 520 U.S. 83 (1997) .. 2

Banque-Russo Asiatique–London v. United States Shipping Board Emergency Fleet Corporation, 266 F.897 (E.D.Pa.1920) ... 3

Burkholder v. U.S., 56 F.Supp. 106, 109 (E.D. Penn. 1944) .. 3

Calmar S.S. Corp. v. United States, 345 U.S. 446 (1953) 3

TABLE OF CONTENTS Cont'd:

Page

CASES Cont'd:

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 1

Favorite v. Marine Personnel & Provisioning, Inc., 955 F.2d 382 (5th Cir. 1992) 6

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75 (1997) 1, 2

Johnson v. United States Shipping Board Emergency Fleet Corporation, 280 U.S. 320 (1929) 3

J.W. Petersen Coal & Co v. United States, 323 F.Supp. 1198 (N.D.Ill.1970) 8

Morales-Melendez v. Steamship Mutual Underwriting Association, 763 F.Supp. 1174 (D.P.R.1991) 6, 7

Nakano v. United States and Vessel Charters, Inc., 1988 AMC 2220 (S.D.Cal.1988) . . . 3

TABLE OF CONTENTS Cont'd:

Page

CASES Cont'd:

Olavarria & Co. v. United States,
56 F.Supp. 758 (S.D. Ala.1944) 3

Peneiro v. United States,
65 F.Supp. 191 (N.D. Cal. 1945) 3

Trautman v. Buck Steber, Inc.,
693 F.2d 440 (5th Cir.1982) 7, 8

Vella v. Ford Motor Co., 421 U.S. 1 (1975) 2

Western Tankers Corp. v. U.S.A.,
1975 A.M.C. 775 (S.D. N.Y. 1975) 3

ARGUMENT:

I. The ruling by the Louisiana Supreme Court constitutes a "final decree" for purposes of 28 U.S.C. section 1257 . 1

II. Liability for Respondent's claims is transferred to the United States by virtue of the Suits in Admiralty Act .. 2

III. Conclusion 8

I. THE RULING BY THE LOUISIANA SUPREME COURT CONSTITUTES A "FINAL DECREE" FOR PURPOSES OF 28 U.S.C. SECTION 1257

The federal issues in this case have been finally resolved by the highest court in Louisiana. The ruling by the Louisiana Supreme Court to deprive Waterman of its immunity under 46 U.S.C. section 745 constitutes a "final decree" within the meaning of 28 U.S.C. section 1257. That ruling is not subject to further review or correction in any other state tribunal. This is a case in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975).

Respondent's reliance upon *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75(1997) is misplaced. The state court ruling on the federal issue in that case was not final because "the City maintains that its fire department responded promptly to the call... If the City prevails on this account of the facts, then any section 1983 claim will necessarily fail, however incorrect the Alabama Supreme Court's ruling, for the city will have established that its actions did not cause Ms. Jefferson's death." 522 U.S. at 82. In this case, on the other hand, liability for maintenance and cure is automatic, without the necessity for any showing of fault. Respondent was injured while in the service of the ship. Irrespective of fault, Waterman will face liability for unpaid maintenance and cure if it is stripped of its 46 U.S.C. section 745 immunity. Whereas an absence of

fault could have mooted the federal issues in *Jefferson v. City of Tarrant, Alabama*, the federal issue in this case will not be mooted by an absence of fault on the part of Waterman. The duty to pay maintenance and cure is imposed "irrespective of the absence of shipowner negligence". *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975).

The only other case Respondent cites in support of his theory that the ruling by the Louisiana Supreme Court is not final for purposes of 28 U.S.C. section 1257 is *Adams v. Robertson*, 520 U.S. 83 (1997). This Court declined to consider the federal claim in *Adams* because the petitioners did not present their federal claim in the lower court with "fair precision and in due time." 520 U.S. at 88. In this case, on the other hand, Waterman timely raised its federal claims with fair precision. The motion for summary judgment specifically asserted that Waterman is immune from suit by virtue of the exclusivity of liability provisions of 46 U.S.C. section 745. The denial of that motion was timely reviewed by the Louisiana appellate courts, and has been properly brought before this Court.

II. LIABILITY FOR RESPONDENT'S CLAIMS IS TRANSFERRED TO THE UNITED STATES BY VIRTUE OF THE SUITS IN ADMIRALTY ACT.

Respondent's opposition merely restates the obvious, which is, that in order to show a vessel was "operated by" the United States for purposes of 46 U.S.C. section 741, it must be shown that the United

States exercised operational control over the vessel.

The "operational control" test, while relevant to show a vessel was "operated by" the United States, is not applicable when a vessel is "operated for" the United States by a private company. The SIAA applies where a vessel is privately operated for the United States, even if the government does not exercise operational control over minute aspects of day to day activities aboard the ship. *Calmar S.S. Corp. v. United States*, 345 U.S. 446 (1953); *Johnson v. United States Shipping Board Emergency Fleet Corporation*, 280 U.S. 320 (1929); *Nakano v. United States and Vessel Charters, Inc.*, 1988 AMC 2220 (S.D.Cal.1988); *Western Tankers Corp. v. U.S.A.*, 1975 A.M.C. 775 (S.D. N.Y. 1975); *Peneiro v. United States*, 65 F.Supp. 191, 192 (N.D. Cal. 1945); *Burkholder v. U.S.*, 56 F.Supp. 106, 109 (E.D. Penn. 1944); *Olavarria & Co. v. United States*, 56 F.Supp. 758 (S.D. Ala.1944); *Banque-Russo Asiatique–London v. United States Shipping Board Emergency Fleet Corporation*, 266 F.897 (E.D.Pa.1920).

If Congress had intended the Act to apply only if a ship were operated by the United States, *i.e.*, if the United States exercised operational control over a ship, then there would have been no need for Congress to have added the additional clause stating the Act applies if a vessel is "operated for" the United States. See, 46 U.S.C. section 741.

The MAJOR STEPHEN PLESS was being operated for the United States of America by Waterman Steamship Corporation, and was carrying exclusively military cargo. Sections 741-742 of the Suits in Admiralty Act therefore supply a jurisdictional hook for suit by Anderson against the United States.

Once a jurisdictional hook under the Act has been established, the next inquiry is whether there would be a basis to impose liability upon the United States. This can be accomplished in either of two ways. The first method by which liability can be imposed upon the United States under the SIAA is if the United States, in its capacity as a charterer, would have been liable if it were a private party. Respondent devotes much of his brief to his theory that in order for a private time charterer to have liability for an injury aboard a vessel, the charterer must have exercised operational control. This argument overlooks the second basis by which liability can be imposed upon the United States under the SIAA, namely, if the vessel itself would face potential liability if it were privately owned.

The United States can be held liable under the SIAA not just if a private time charterer could have been held liable under similar circumstances, but also, if the vessel itself could have been held liable if it were privately owned. "The apparent intent of sections 1 and 2 of the act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course

of transportation, and to substitute for an action *in rem* against the vessel or cargo an action *in personam*." *Banque-Russo Asiatique–London v. United States Shipping Board Emergency Fleet Corporation*, 266 F.897 (E.D.Pa.1920) (emphasis added).

The SIAA substitutes liability of the United States in place of liability that could have been imposed upon a vessel being operated for the United States. The SIAA operates "to substitute the Government for the vessel or the cargo... It is generally conceded that the Suits in Admiralty Act of March 1920 substitutes a remedy *in personam* against the United States for one in rem." *Olavarria & Co. v. United States*, 56 F.Supp. 758, 759 (S.D. Ala.1944) "[A] cause of action *in personam* against the United States may be maintained ... in those cases where the libelant would have a cause of action *in rem*..." *Id.* at 760 (emphasis added).

Respondent myopically focuses on operational control being needed to establish *in personam* liability, but fails to grasp that liability is also transferred to the United States of America pursuant to the Suits in Admiralty Act "if the suit could be maintained against a private vessel when the suit was filed." *Id.* at 762.

Many of the cases Respondent has used to try to prop up his theory did not even involve claims that exposed a vessel to *in rem* liability, and therefore have no applicability here. For example, *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir.1989) involved only Jones Act negligence and alleged general maritime

law negligence, but not unseaworthiness or maintenance and cure. The Fifth Circuit therefore did not have to address whether *in rem* liability of the S.S. BAY would have arisen, and only assessed whether the United States would have had *in personam* liability. The issue here is not whether the United States would have liability in its capacity as charterer of the MAJOR STEPHEN PLESS, but rather, whether the vessel itself would face liability for Respondent's claims.

Anderson's reliance upon *Favorite v. Marine Personnel & Provisioning, Inc.*, 955 F.2d 382 (5th Cir. 1992) is also misplaced. Clifton Favorite was injured while working aboard a vessel that had been bareboat chartered to the United States. The Fifth Circuit held that "as the bareboat charterer, the United States did not need to assume liability; the liability attached with the bareboat charter." Accordingly, the injured seaman's exclusive remedy lay against the United States, and the operator of the vessel was immune from suit pursuant to the exclusivity of liability provision of the SIAA. All of plaintiff's claims against the private operator were dismissed pursuant to the exclusivity of liability provisions of the SIAA, including his Jones Act claims as well as unseaworthiness and maintenance and cure claims. *Favorite*, 955 F.2d at 385.

Another case Respondent mistakenly relies upon for his "operational control" theory is *Morales-Melendez v. Steamship Mutual Underwriting Association*, 763 F.Supp. 1174 (D.P.R.1991). The plaintiff in *Morales-Melendez* was a marine cargo inspector who was not a

member of the crew of the M/V PAUL BUCK, a vessel under time charter to the Military Sealift Command. 763 F.Supp. at 1176, 1177 n.6. Unlike crewmember Herbert Anderson, the non-crewmember cargo inspector in *Morales-Melendez* was not owed any warranty of seaworthiness, and had no entitlement to maintenance and cure. Rather, his claims were exclusively *in personam* negligence claims. Since a private time charterer that did not exercise operational control would not have faced liability for his negligence claims, no liability was imposed upon the United States. The M/V PAUL BUCK was not exposed to liability by his claims, since they sounded exclusively in negligence. *In rem* liability of the M/V PAUL BUCK was therefore not transferred to the United States under the SIAA. In this case, on the other hand, Respondent's unseaworthiness and his maintenance and cure claims expose the MAJOR STEPHEN PLESS to *in rem* liability, and that liability is transferred to the United States by the SIAA.

Another case that provides Anderson no support for his theory but which he nonetheless cites in opposition to the Petition for *Certiorari* is *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir.1982). The Fifth Circuit therein affirmed the district court holding that the diving barge to which Trautman had been assigned was not operated by or for the United States and "accordingly the United States owed no warranty of seaworthiness to appellant." 693 F.2d at 442. Obviously, since Trautman was owed no warranty of seaworthiness, there was no vessel operated by or for

the United States subjected to potential *in rem* liability.

Trautman cites to *J.W. Petersen Coal & Co v. United States*, 323 F.Supp. 1198, 1205-06 (N.D.Ill.1970) in its discussion of how control by the United States is required in order to support a finding that a vessel was operated *by* the United States. That case properly draws the distinction between operational control being exercised by the government when a vessel is being operated *by* the government, and control being exercised by a private company when the vessel is being operated *for* the United States. Whereas "extensive operation or direction of the vessel by government personnel would be required to make the vessel operated *'by the United States'*", the court observed that in a time charter situation where a vessel is operated "*for the United States*", the private "owner may control the operation of the vessel's personnel and equipment". 323 F.Supp. at 1205-06 (emphasis added). Thus, while operational control by the United States is necessary in order to show that a vessel is operated *by the United States*, there is no such requirement in order to show that a vessel is operated *for the United States*.

CONCLUSION

Anderson's unseaworthiness and his maintenance and cure claims expose the MAJOR STEPHEN PLESS to potential *in rem* liability. Since the vessel was being operated for the United States, and faces potential *in rem* liability, liability for Anderson's claims is

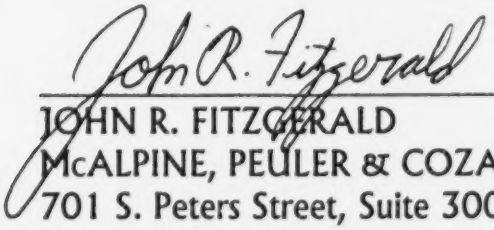
automatically transferred to the United States of America pursuant to section 742 of the Suits in Admiralty Act. Waterman Steamship Corporation, the private operator of the vessel, is shielded from liability by virtue of section 745 of the Act, even if its "act or omission gave rise to the claim." 46 U.S.C. section 745.

The ruling of the Louisiana Supreme Court exposes to arrest privately operated vessels carrying exclusively military cargo. The Supreme Court should consider this matter in light of the profound and detrimental consequences the ruling has upon the ability of the United States Military Sealift Command to ensure that cargo needed to support military operations abroad will not be delayed or halted by vessel arrests on personal injury claims. The only statute barring such vessel arrests is the Suits in Admiralty Act. The Louisiana Supreme Court has rendered nugatory the provision of 46 U.S.C. section 741 that states the SIAA applies where vessels are "operated for" the United States. The ruling by the highest state court in Louisiana misconstrues the Act as applying only where the government exercises operational control over the day to day activities aboard a vessel, a test unlikely to be met where vessels hauling ammunition and military supplies are privately operated by companies such as Waterman Steamship Corporation.

WHEREFORE, this Court should GRANT Waterman's Petition for *Certiorari*, and REVERSE the ruling of the Louisiana Supreme Court that improperly stripped Waterman of its 46 U.S.C. section 745 immunity.

DATED this 22nd day of June, 2000.

Respectfully submitted,



JOHN R. FITZGERALD
McALPINE, PEULER & COZAD
701 S. Peters Street, Suite 300
New Orleans, LA 70130
Phone: (504) 561-0323
Counsel for Waterman S.S. Corp.